No. 92-759

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ARTHUR JONES,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are false statements in a television broadcast accusing Petitioner of hypocrisy, lying, unscrupulousness and cruelty to animals actionable defamation or merely non-actionable "privileged opinion"?

THE PARTIES

Petitioner is Arthur Jones, inventor of Nautilus exercise equipment. Jones maintains an estate in Central Florida, near Ocala, known as Jumbolair. Respondent is the American Broadcasting Companies, Inc. (ABC), one of the nation's three leading broadcasting companies.

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DECISIONS BELOW

The original District Court decision in *Jones v. American Broadcasting Company, Inc.* officially is reported at 694 F.Supp. 1542 (M.D. Fla.1988). The Eleventh Circuit originally affirmed the District Court by a per curiam decision reported at 893 F.2d 1342 (11th Cir. 1989).

Petitioner filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit with this Court. (Case No. 89-1952 in this Court.) On 9 October 1990 this Court granted the petition and vacated the Eleventh Circuit's judgment. The case was remanded for further consideration in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed. 2d 1 (1990). See, *Jones v. American Broadcasting Companies*, ___ U.S. ___, 111 S.Ct. 239, 112 L.Ed. 2d 199 (1990).

Thereafter, following remand from this court, on 5 June 1992 the Eleventh Circuit, in a three-paragraph per curiam opinion declined to reconsider its earlier decision and once again affirmed. A petition for rehearing was denied on 4 August 1992.

JURISDICTION

Jurisdiction to consider this petition is conferred on the Court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the deprivation of a libeled plaintiff's constitutional protection contained within the Fifth Amendment to the U.S. Constitution:

> No person shall . . . be deprived of life, liberty, or property without due process of law, . . .

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

STATEMENT OF THE CASE

A. The Facts

Petitioner adopts his prior statement of the case (including the facts and course of proceedings) stated in his Petition for Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit in Case No. 89-1952, served 25 May 1990.

Petitioner simultaneously files 40 copies of the Petition for Writ of Certiorari and 40 copies of the appendix in Case No. 89-1952. For brevity, Petitioner adopts his argument contained in that petition before the Court issued its decision in *Milkovich*.

B. The Proceedings After Remand

On 29 August 1991, Petitioner Jones served a motion to allow access of audio tape to oral argument in the Eleventh Circuit which occurred Wednesday, 13 December 1989. Petitioner requested access to the audio tape of oral argument to prepare his supplemental reply brief in the Eleventh Circuit and for anticipated renewed oral argument.

Unlike oral arguments before this Court, the Eleventh Circuit does not make transcripts of its proceedings available to the public in law libraries and the like. On 18 September 1991, the motion for access to the audio tape was denied. (A copy of the motion and the Court's order is included in the Appendix).[1]

The Eleventh Circuit rendered its per curiam decision after remand without oral argument. The court reconsidered the appeal on supplemental briefs only.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

ON REMAND FROM THIS COURT, THE ELEVENTH CIRCUIT WAS ORDERED TO RECONSIDER PETITIONER'S APPEAL IN LIGHT OF *MILKOVICH*: ON RECONSIDERATION THE ELEVENTH CIRCUIT IGNORED THE FACT VERSUS OPINION ISSUE RELATING TO DEFAMATION AND ERRONEOUSLY HELD THAT THE DISTRICT COURT'S " . . . FINDING OF NO DEFAMATION . . . LOGICALLY PRECEDES ITS FINDING OF NON-ACTIONABLE OPINION."

In its 9 October 1990 Order, this Court vacated the judgment of the United States Court of Appeals for the Eleventh Circuit and remanded this cause "for further consideration in light of" *Milkovich v. Lorain Journal,* supra, (112 L.Ed. 2d 199).

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[1] Access to the tape was sought, inter alia, to point out to the Eleventh Circuit that one member of the panel apparently believed erroneously that *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L.Ed. 2d 686, 84 S.Ct. 710 (1964) and the "actual malice" standard applied here.

In a three-paragraph opinion, the Eleventh Circuit saw "no reason to reconsider" its per curiam affirmance. See, *Jones v. American Broadcasting Co., Inc.*, 893 F.2d 1342 (11th Cir. 1989). The Eleventh Circuit interpreted the District Court's opinion (694 F.Supp. 1542, M.D. Fla. 1988) as first holding that the statements Jones complained of were non-defamatory. It then stated that the district court finding of no defamation "logically precedes" the same court's finding that certain statements might be actionable if they were not opinion, i.e. the district court's statements about non-actionable opinion were dicta which the Eleventh Circuit was *not* required to reconsider "in the light of" *Milkovich.*

Although its Order was entitled Order On Motion For Summary Judgment, the District Court in reality was ruling on a motion to dismiss.[2] In its opinion, it dealt with the sufficiency of the Complaint.

In that opinion, the District Court first listed the legal issues [694 F.Supp. 1548-1549]:

1. Under Florida law, in order for the statements upon which Jones bases his complaint to be actionable, those statements must be reasonably capable of a defamatory meaning.

2. The determination of whether the statements made in the broadcast are reasonably

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[2] Petitioner urged the District Court to determine defamatory meaning at the outset on a motion to dismiss before any expense was incurred by the parties on discovery. ABC, however, objected insisting that discovery was essential to the determination of defamatory meaning.

capable of a defamatory meaning is a question of law for the Court to decide.

3. The entire broadcast should be considered by the Court in determining whether, in the context of the broadcast, the statements made are reasonably capable of a defamatory meaning as to Plaintiff.

4. The determination of whether the statements attacked are protected statements of opinion is also a question of law for the Court to decide.

5. Plaintiff bears the burden of identifying particular statements in the broadcast, demonstrating that those statements are reasonably capable of a defamatory connotation, and demonstrating that the statements are fact rather than opinion. Summary Judgment is proper if there exists no genuine issue as to any material fact,

Then, the District Court considered in order:

1. Whether Plaintiff has identified specific statements in the broadcast that defame him?

2. Whether the statements made in the broadcast are reasonably capable of a defamatory connotation?

3. Whether the statements made in the broadcast are protected statements of opinion and thus nonactionable?

(694 F.Supp. 1549)

After finding that the complaint did sufficiently identify the alleged defamatory statements, the District Court

found that some of them were not capable of a defamatory meaning (694 F. Supp. 1551-1552).

The Court then examined the "remaining 'implications' asserted by Plaintiff as defamatory" (694 F.Supp. 1553). As to several it said:

> This constitutes the statements in the broadcast which refers to Plaintiff's keeping a promise or not, and perhaps to his "honesty." *If these statements are factual in nature they might be actionable.* However, the Court finds that these statements are non-actionable opinion. 694 F.Supp. at 1552 (E.S.)

As to still others, the District Court dismissed them out of hand as "non-actionable" opinion, applying the "wholesale defamation exemption" for opinion that this Court rejected in *Milkovich* (694 F.Supp. 1552-1553).

The District Court's ruling was clear; some of the statements or implications Plaintiff complained of were fact and not capable of a defamatory meaning; other statements or implications were capable of a defamatory meaning but were opinion and, therefore, non-actionable; still other statements or implications were opinion and non-actionable for that reason alone without considering whether or not they were capable of a defamatory meaning.

The District Court did not, as the Eleventh Circuit stated, first rule that all the allegations in the Complaint were not capable of a defamatory meaning and then as an afterthought, throw in as dicta that they were non-actionable because they were opinion.

The District Court ruled that some of the statements or implications were opinion and therefore non-actionable, although they would otherwise be capable of a defamatory meaning and that others were non-actionable because they were opinion.

That is what this Court told the Eleventh Circuit to consider further "in light of" *Milkovich* and what the Eleventh Circuit sidestepped, saying it could "see no reason to reconsider."

The logic employed by the District Court further was (694 F.Supp. 1550-1551):

> It is a question of law for the trial judge rather than a jury, as to whether or not the statements at issue are fact or *non-actionable opinion*, and *if fact*, whether they are reasonably capable of ,a defamatory meaning. Diplomat Electric, Inc. v. Westinghouse Electric Supply Company, 378 F.2d 377, 382 (5th Cir. 1967). There is a distinction between pure opinion and a mixed expression of opinion. Pure opinion is based on facts set forth in the broadcast or publication, or fact that are otherwise known available to the reader or listener as a member of the public. Mixed opinion is based on facts relating to a person or his conduct that are neither stated in the publication or broadcast nor assumed to exist by a party exposed to the communication. Rather, the communication "implies" that a concealed or undisclosed set of defamatory facts would confirm his opinion. Pure opinion is protected by the First Amendment; mixed opinion is not. Hay v. Independent Newspapers, Inc., 450 So. 2d 293 (Fla. 2d DCA 1984). If a statement

> is susceptible to two interpretations, one defamatory and one not, a jury should determine whether the statement is defamatory. Hallmark Builders, Inc. v. Gaylord Broadcasting, 733 F.2d 1461, 1463 (11th Cir. 1984). (Emphasis supplied)

The Eleventh Circuit stated in its opinion following remand from this Court:

> "Without a showing of defamation, however, the question of *affirmative defenses* obviously does not arise. The District Court's finding of no defamation therefor logically precedes its finding of non-actionable opinion. Only the latter finding, however, arguably could be affected by the Supreme Court's opinion in *Milkovich*. . . . " (Emphasis supplied)

The District Court did not address an "affirmative defense" of "opinion." The District Court considered "non-actionable opinion" as a matter of "Constitutional Law" creating a "wholesale exemption" for everything that might be labeled "opinion." *Milkovich* (111 L.Ed. 2d at 17) rejected this.

The District Court quoted extensively (694 F.Supp. 1549-1550) from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), which this Court clarified in *Milkovich* (111 L.Ed. 2d at 17). By once again affirming, the Eleventh Circuit continues to repeat the erroneous application of *Gertz* and to ignore *Milkovich*. This creates obvious conflict with the decision of this Court in *Milkovich v. Lorain Journal Co.*

The District Court stated:

> Much of the broadcast consists of *non-actionable opinion* based either on facts set forth in the

> broadcast or otherwise known or available to the public, i.e., expert opinion, Pat Derby's opinion as to the preferable fate of the elephants . . . (694 F.Supp. 1553). (Emphasis supplied)

Later, the District Court stated (694 F.Supp. 1553):

> In the *opinion* of some, including Pat Derby "expert elephant handler" the "dumped" elephants may become problems if they are not properly handled after they leave the herd. Ms. Derby's *opinion* is that the elephants would have been better off being left to cull than having the herd separated. It is also the *opinion* of Roger Caras that life for an elephant in a circus in Mexico is fate worse than death. Ms. Derby, as well as Roger Caras and Barbara Walters, are *of the opinions* that Plaintiff should have assumed responsibility for the elephants forever and keep the herd together. Mr. Caras *thinks* Plaintiff should endow the herd with some of his millions. (Emphasis supplied)

This Court has recognized that the distinction between "fact" and "opinion" is an "inevitably arbitrary line." See, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169, 102 L.Ed.2d 445, 463, 109 S.Ct. 439 (1988). In *Rainey*, the court determined that portions of investigatory reports in the form of opinions or conclusions are not excluded from the hearsay exception of Federal Rule of Evidence 803(8)(c). That rule makes a hearsay exception only for "factual findings resulting from an investigation." This Court said in *Rainey*:

> Our conclusion that neither the language of the Rule nor the intent of its framers calls for a distinction between "fact" and "opinion" is

strengthened by the analytical difficulty of drawing such a line. It has frequently been remarked that the distinction between statements of fact and opinion is, at best, one of degree:

> "All statements in language are statements of opinion, i.e., statements of mental processes or perceptions. So-called 'statements of fact' are only more specific statements of opinion. What the judge means to say, when he asks the witness to state the facts, is: 'The nature of this case requires that you be more specific, if you can, in your description of what you saw.' " W. King & D. Pillinger, Opinion Evidence in Illinois 4 (1942) (footnote omitted), quoted in 3 J. Weinstein & M. Berger, Weinstein's Evidence §701[01], p. 701-6 (1988).

See also E. Cleary, McCormick on Evidence 27 (3d ed 1984) ("There is no conceivable statement however specific, detailed and 'factual,' that is not in some measure the product of inference and reflection as well as observation and memory"); R. Lemphert & S. Saltzburg, A Modern Approach to Evidence 449 (2d ed 1982) ("A factual finding, unless it is a simple report of something observed, is an opinion as to what more basic facts imply"). Thus, the traditional requirement that lay witnesses give statements of fact rather than opinion may be considered, "[l]ike the hearsay and original documents rules . . . a 'best evidence' rule." McCormick, Opinion Evidence in Iowa, 19 Drake L Rev. 245, 246 (1970). (488 U.S. 168-169, 102 L.Ed. 2d 462).

As to some "opinions" in the broadcast, the District Court determined they were "non-actionable" because

the statements did not imply a "concealed or undisclosed set of defamatory facts" (694 F.Supp. 1552).

The Eleventh Circuit refused to reconsider whether *Milkovich* permits such an "inevitably arbitrary line." This case should not have been subject to summary judgment before the District Court allowed the Plaintiff even to finish discovery (particularly when ABC insisted discovery was necessary to determine defamatory meaning). See, *Jones v. American Broadcasting Companies, Inc.*, supra, 694 F.Supp. 1542-1543.

At oral argument in *Milkovich*, this Court criticized prefacing a statement with "in my opinion" as a "handy device" for concealing defamatory meaning. (Page 28 of the Official Transcript of the Proceedings in *Milkovich*, April 24, 1990.) By determining the District Court addressed only "affirmative defenses," the Eleventh Circuit changed a dispositive ruling that "Save the Elephants" was "protected" from a libel action by labeling statements "non-actionable opinion" (694 F.Supp. 1549). The District Court determined "opinions" were non-actionable, even though defamatory (694 F.Supp. 1552).

Petitioner's prior argument in his petition filed in Case No. 89-1952, therefore, is incorporated by reference herein. That petition presented the dispositive ruling of the District Court in the light of *Milkovich*, pending at the time in this Court.

This Court recognized in *Milkovich* that "expressions of 'opinion' may often imply an assertion of objective fact." (*Id.*) The decision represents the Court's intent to explore carefully whether reporting of newsworthy

events is capable of defamatory meaning *as a matter of substance* – not form.

Propaganda techniques were utilized by the producers of "Save the Elephants" to capture the minds of its viewers. That which Judge Kovachevich labeled opinion, by clever manipulation, was capable of being believed as truth. Objective truth evaporated.

The condemnation of Jones for commencing to disperse the herd, after allegedly saving the elephants, with great fanfare, from certain slaughter in Africa, was accomplished by subjective accusation, insinuation and innuendo, created by the ABC producers who maliciously vilified Jones as the personification of what ABC now contends was its target, the cruel "system" of animal abuse. "Truth" as reported in the broadcast was an amalgamation of ABC's subjective manipulation.

ABC's managed news corresponded only to the undisclosed interest, motivation, bias and point of view of ABC producers and personnel with their subjective ideas of "truth." The viewing public learned nothing except what the producers wanted them to know and believe. There was no fair exchange of ideas in the marketplace.

ABC produced a subjective program vying for animal rights under the guise of an objective news report. Thus, any notion of "opinion" was subsumed by a factual news account portrayed on millions of television screens nationwide.

Milkovich makes the manipulation employed by ABC here actionable because it depicts a false factual meaning.

By combination of video and audio medium to send its message, by "sound bites," by ridicule and scorn, ABC was able to transmit to millions a defamatory meaning. The net result was irreparable damage to Arthur Jones' self-esteem and reputation. "Save the Elephants," viewed in its entirety, defamed Petitioner. The broadcast imputed dishonesty, hypocrisy and cruel indifference to the elephants' future welfare.

ABC accused Jones of "dumping" the elephant herd to "a fate worse than death" (App. 174). Plaintiff was accused of exposing the herd to a doomsday future of improper diet, cruelty, mishandling and neglect, in short, to "every kind of atrocity in the world" (App. 170). Considering the impact of the broadcast, the defamation of "Save the Elephants" could not be privileged and immunized even had ABC prefaced its "opinions" with "I think," "in my opinion," "it is my belief" or any other clear expression of opinion.[3]

It is frustrating and ironical that in this case, filed in 1987, there has still not been a ruling whether the broadcast considered in its entirety, was susceptible of a defamatory meaning. If *Milkovich* had been decided in 1987, the District Court presumably would have held that some of the statements in the broadcast were capable of a defamatory meaning, whether they were statements of "fact" or "opinion."

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[3] The letter from the United States Humane Society sent to Petitioner shortly after "Save The Elephants" was broadcast (published at 42-44 of the petition for writ of certiorari in Case No. 89-1952) serves as evidence of the reputational harm suffered instantly by Arthur Jones.

In its pre-*Milkovich* opinion, the District Court held that but for the "wholesale defamation exemption" which this Court rejected in *Milkovich* some of the allegations of the Complaint were capable of a defamatory meaning. The District Court did not rule whether other statements in the broadcast were capable of a defamatory meaning because it first held they were opinion and never got to the merits.

Then, five years later, the Eleventh Circuit which on the original appeal wrote no opinion explaining the reasons or logic for its affirmance of a District Court opinion grounded upon erroneous law, said it had "no reason to reconsider" because the District Court's extensive statements and reasoning about opinion in effect were surplusage.

CONCLUSION

For the reasons stated Petitioner prays that this Court once again grant this petition and vacate the Eleventh Circuit's judgment and remand this case with instructions to reverse the summary judgment entered below by the District Court and remand this case for further proceedings in the District Court.

Respectfully submitted,

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APPENDIX

MEMORANDUM CASES

No. 89-1952. Arthur Jones, Petitioner v American Broadcasting Companies, Inc.

October 9, 1990. On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Milkovich v Lorain Journal Company, 497 US ___, 111 L Ed 2d 1, 110 S Ct 2695 (1990). Justice Souter took no part in the consideration or decision of this case.

Same case below, 893 F2d 1342.

Arthur JONES, Plaintiff-Appellant,

v.

AMERICAN BROADCASTING COMPANY, Defendant-Appellee.

No. 88-3925.

United States Court of Appeals,
Eleventh Circuit.

June 5, 1992.

Appeal from the United States District Court for the Middle District of Florida; Elizabeth A. Kovachevich, Judge.

On Remand from the Supreme Court of the United States

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

This appeal is before us after a remand from the United States Supreme Court for further consideration in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). *See Jones v. American Broadcasting Cos.*, ___ U.S. ___, 111 S.Ct. 239, 112 L.Ed.2d 199 (1990). Having reconsidered our decision affirming the district court's judgment in *Jones v. American Broadcasting Cos.*, 694 F.Supp. 1542 (M.D.Fla.1988), we once again affirm.

The Supreme Court's opinion in *Milkovich* addressed an affirmative defense against a defamation action. *Milkovich* clarified that merely labeling an allegedly defamatory statement an "opinion" does not insulate that statement against a defamation action. *Milkovich*, 497 U.S. at ___, 110 S.Ct. at 2705. While the district court in the present case found that certain allegedly defamatory statements represented non-actionable opinions, *Jones*, 694 F.Supp. at 1552, it also found that, "[t]aken in context and without giving the broadcast any 'tortured' interpretation, . . . a reasonable person would not have interpreted the broadcast, in whole or in part, as being defamatory to [appellant]." *Id.* at 1553.

Without a showing of defamation, however, the question of affirmative defenses obviously does not arise. The district court's finding of no defamation therefore logically precedes its finding of non-actionable opinion. Only the latter finding, however, arguably could be affected by the Supreme Court's opinion in *Milkovich*. Accordingly, we see no reason to reconsider our affirmance of the district court's judgment on the alternate, and logically prior, ground of absence of defamation.

The judgment of the district court is AFFIRMED.

IT IS SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-3925

ARTHUR JONES,

Plaintiff-Appellant,

versus,

AMERICAN BROADCASTING COMPANY,

Defendant-Appellee.

(Filed Aug. 4, 1992)

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING
(June 5, 1992)

BEFORE TJOFLAT, Chief Judge, ANDERSON, Circuit Judge and JOHNSON, Senior Circuit Judge.

PER CURIAM:

The petition(S) for rehearing filed by Appellant, is denied.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 88-3925

ARTHUR JONES,

Plaintiff-Appellant,

vs.

AMERICAN BROADCASTING COMPANY,

Defendant-Appellee.

_____/

MOTION TO ALLOW ACCESS OF AUDIO TAPE TO ORAL ARGUMENT
Florida Bar No. 048402

Plaintiff-Appellant, ARTHUR JONES, by his undersigned attorney, respectfully moves to permit and direct the Honorable Clerk of the United States Court of Appeals for the Eleventh Circuit to copy and mail to the undersigned, at the cost of the Plaintiff-Appellant, the audio tape recording of the oral argument before this Court on Wednesday, 13 December 1989, and for reason thereof states:

1. In the briefs filed in the United States Supreme Court and the most recent briefs filed in this Court, the parties accuse one another of shifting positions from the various courts: (i) the United States District Court for the Middle District of Florida; (ii) United States Court of Appeals for the Eleventh Circuit; and (iii) United States Supreme Court.

2. During oral argument before this Honorable Court on Wednesday, 13 December 1989, members of the panel asked various questions of counsel. It would be of benefit in this appeal, both to the Court and the undersigned, if a copy of the audio tape recording of the oral

argument were made available to Appellant's counsel in preparing the Appellant's Reply Brief. Appellant has no objection if the same audio tape were made available to Appellee's counsel. Additionally, if this case is re-argued, the audio tape would also assist the undersigned in preparation for renewed oral argument.

WHEREFORE, Appellant prays for entry of an order allowing access to the audio tape of oral argument in this appeal held Wednesday, 13 December 1989.

Respectfully submitted,

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By Paul A. Louis
PAUL A. LOUIS

By Evan J. Langbein
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail to GREGORY G. JONES, ESQ., CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A., One Harbour Plaza, P. O. Box 3239, Tampa, FL 33601, this Thursday, 29 August 1991.

By Paul A. Louis
PAUL A. LOUIS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3925

ARTHUR JONES,

Plaintiff-Appellant,

versus

AMERICAN BROADCASTING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(Filed Sep. 18, 1991)

ORDER:

Appellant's motion for an extension of time in which to file supplemental reply brief to and including October 12, 1991, is GRANTED.

Appellant's motion to allow access of audio tape to oral argument is Denied.

/s/ GERALD BARD TJOFLAT
CHIEF UNITED STATES
CIRCUIT JUDGE

No. _____

In The
Supreme Court of the United States

October Term, 1989

ARTHUR JONES

Petitioner,

vs.

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Respondent,

Petition For Writ Of Certiorari To
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For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Are false statements in a television broadcast accusing Petitioner of hypocrisy, lying, unscrupulousness and cruelty to animals actionable defamation or merely non-actionable "privileged opinion"?

THE PARTIES

Petitioner is Arthur Jones, inventor of Nautilus exercise equipment. Jones maintains an estate in Central Florida, near Ocala, known as Jumbolair. Respondent is the American Broadcasting Companies, Inc. (ABC), one of the nation's three leading broadcasting companies.

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DECISIONS BELOW

(A) The District Court's decision in Jones v. American Broadcasting Companies, Inc., is officially reported at 694 F.Supp. 1542 (M.D.Fla. 1988). On Appeal, the Eleventh Circuit affirmed the District Court by a per curiam decision, without rendering an opinion, on December 21, 1989. Rehearing was denied on February 27, 1990, and the mandate issued on March 7, 1990.

JURISDICTION

Jurisdiction to consider this petition is conferred on the Court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the deprivation of a libeled plaintiff's constitutional protection contained within the Fifth Amendment to the U.S. Constitution:

> No person shall ... be deprived of life, liberty, or property without due process of law-,...

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law ... abridging the freedom of speech, or of the press.

STATEMENT OF THE CASE

A. The Facts

This Court recently granted certiorari to review Milkovich vs. The Lorain Journal Co. et al, __ U.S. __, 107 L.Ed.2d 947 (Jan. 22, 1990); see also, Milkovich v. Lorain Journal Co., 46 Ohio Supp. 3d 20, 545 N.E.2d 1320 (1989). Like Milkovich, this case features the crucial, recurring issue a defamation plaintiff encounters when he sues a media defendant: are the defamatory statements non-actionable because they may be categorized as "opinion," rather than "fact"?[1]

In 1984, ABC broadcast "The Flying Elephants" idealizing Petitioner, ARTHUR JONES (Jones).

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[1]Petitioner is indebted to Petitioner in Milkovich for providing copies of both their petition for writ of certiorari and brief filed with this Court. Because of the similarity of the legal issues presented, Petitioner herein adopts much of the legal argument made in the Milkovich case which has been argued in this Court.

Jones maintains an estate in Central Florida, near Ocala, known as Jumbolair. In 1984, ABC reported Jones' daring flight to Zimbabwe, Africa to rescue 63 baby elephants, endangered by a Zimbabwe culling program. The elephants were herded aboard Jones' 707 jetliner and airlifted to safety at Jumbolair in Ocala. Petitioner was portrayed as the noble savior of an endangered species, the African elephant.

On March 12, 1987, Respondent, ABC, broadcast a sequel on its weekly "20/20" newsmagazine dubbed "Save the Elephants."

The 1987 sequel was a dramatic turnabout by ABC. Jones was captioned as an "Entrepreneur" who duped ABC and the American public. ABC branded Petitioner an "eccentric Florida millionaire," accusing him of falsity, dishonesty and hypocrisy in his statements, actions and motives in 1984. The network charged Jones with "dumping" the

elephants, dispersing the herd "to a fate worse than death" by selling them to animal trainers using "cruel" techniques, knowing the animals would be abused, neglected and likely would die.[2]

The ABC depiction of Jones employed the caustic moderation of Hugh Downs, Barbara Walters and ABC's "nature and wildlife correspondent," Roger Caras. The feature used edited clips of the 1984 broadcast, and clips of lengthy interviews with Jones and others. ABC employed an "expert," one Pat Derby, Caras' longtime personal friend, who in fact was not an elephant expert. Ms. Derby made disparaging and derogatory "expert" comments regarding Jones' mistreatment of the elephants. Derby's long friendship with Caras was undisclosed to the viewing public (Derby Dep. 77,169).

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[2]The complete official ABC transcript is included in the Appendix, A ____.

ABC also did not inform its viewers that Caras coached his friend Derby to deliver a more "life-and-death" indictment of Petitioner. Caras told Derby in ABC's "outtakes": "Somewhere in this, because some bad things have been done -- somewhere in here there's a villain... Someone is doing something terrible to elephants, which was not the advertised intent when they were brought here..." (ABC's Appendix to Motion for Summary Judgment, Ex. F, p.254-255).

B. The Proceedings

Jones sued ABC, alleging the 20/20 broadcast falsely cast him as a liar and a hypocrite, and accused him of animal cruelty. Jurisdiction of the U.S. District Court was based on 28 U.S.C. §1332 (Diversity of Citizenship). Following depositions of Jones and Derby and production of ABC's "outtakes" and other documents, the District Court granted ABC's Motion for Summary

Judgment. In a lengthy opinion (694 F.Supp. 1542), the Court found that selected statements from the "Save the Elephants" broadcast either were not defamatory as a matter of law, or as to those statements which were capable of defamatory connotation, were protected as "opinion" of ABC. The District Court said (694 F.Supp. 1552):

> This constitutes the statements in the broadcast which refers to Plaintiff's keeping a promise or not, and perhaps to his "honesty." If these statements are factual in nature they might be actionable. However, the Court finds that these statements are non-actionable opinion.

Petitioner urged the Court to be mindful that "it is the medium which is the message." Jones requested the Court to view the entire broadcast, to consider facial expressions of the speakers in the broadcast and their vocal intonations, to evaluate the film clips and editing, as well as the broadcast "outtakes," to determine the

"overall impact" of the ABC 20/20 broadcast.[3] On appeal, the Eleventh Circuit affirmed the District Court without rendering a written opinion.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

THE DISTRICT COURT AND ELEVENTH CIRCUIT ERRONEOUSLY DETERMINED ABC WAS SHIELDED FROM PETITIONER'S CLAIM OF DEFAMATION BY CATEGORIZING THE STATEMENTS IN "SAVE THE ELEPHANTS" AS "OPINIONS" INSTEAD OF "FACTS."

In granting a summary judgment, the trial judge found:

> ...[T]he statements in the broadcast which refers to Plaintiff's [Jones'] keeping a promise or not, and perhaps to his "honesty." If these statements are factual in nature they might be actionable.

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[3]Courts recognize that "the television medium offers the publisher the opportunity, through visual presentation, to emphasize certain segments in ways that cannot be ascertained from merely reading of the transcript." Lasky v. ABC, 631 F.Supp. 962, 970 (S.D.N.Y. 1986). ABC contrasted visual clips of African elephants blissfully roaming in their natural habitat, against a backdrop of a snow-capped mountain range (of what might have been Mt. Kilimanjaro in Tanganyka, not Zimbabwe) with later shots of chained elephants, helplessly thrashing about after Petitioner allegedly "dumped" them into captivity.

> However, the Court finds that these statements are non-actionable opinion. (694 F.Supp. 1552)

As in Milkovich, under scrutiny by this Court, this case presents the repeat question almost reflexively raised by media defendants sued for libel. No matter how false or damaging the innuendo, insinuation or "sting" of the defamation, if the defendant can persuade the court that its assertions are "opinions," not "facts," the issue of defamatory meaning may be removed from a jury's consideration. Because statements of "opinion" and "fact" invite "inevitably arbitrary" distinctions and turn on questions of "degree" [see Beech Aircraft Corp. v. Rainey, ____ U.S. ____, 109 S.Ct. 439 (1988)], a libeled plaintiff's right to vindicate his damaged reputation often turns on "Humpty Dumpty's use of language." Cianci v. New Times Pub. Co., 639 F.2d 54, 64 (2nd Cir. 1980). Note, e.g., the trial

court's revealing subjective statements: "If these statements are factual etc. p. 7 infra. Query: Shouldn't Jones have been given an opportunity to prove that the obvious accusations in the broadcast were false.

Chief Justice Rehnquist observed "Lower courts have seized on the word 'opinion' to solve with a meat axe a very subtle and difficult question,..." Ollman v. Evans, 471 U.S. 1127, 1129 (1985) [dissenting from the denial of certiorari]. The dissenting judge in Milkovich, Justice Brown, noted that the legal test applied to distinguishing assertions of fact from opinion amounted to "no more than a geyser spouting judicial steam, fog and mist." Scott v. News Herald, 496 N.E.2d 699, 723 (Ohio Sup. Ct. 1986).

The confusion surrounding the opinion/-fact dichotomy intensified after this Co-

urt's statement in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974):

> Under the First Amendment there is no such thing as a false idea....

The courts have struggled to adopt and apply varying "tests" or "factors" to determine when an "idea" is separated from "facts" connected with those ideas which are defamatory. See, e.g. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980). The result, too often, is a "meat axe" approach, as it was in Jones' case.

Legal distinction between fact and opinion in libel cases is not new. The distinction "formed the backbone of the fair comment privilege." See, Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell," 103 Harv.

L. Rev. 601, 650 (Jan. 1990). The fair comment privilege "roughly functioned to immunize the publication of honestly held but defamatory opinions about matters of public concern that were fair and communicated without malice." Ibid, at 627.

What has changed drastically since Gertz, however, is the elevation of the distinction to one bearing constitutional immunity. The courts now have created numerous local and varied formulae for differentiating a supposedly protected "opinion" from an unprotected "fact" which damages reputation.

For instance, the factors applied in Milkovich were adopted from Ollman v. Evans, supra: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared. Other courts have been less

precise in reaching conclusions that "opinions" are constitutionally protected. See, e.g., Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976); Hotchner v. Castillo - Puche, 551 F.2d 910 (6th Cir. 1977); McCabe v. Rottiner, 814 F.2d 839 (1st Cir. 1987). In this case, no "test" or legal analysis was applied; the lower courts simply took the "meat axe" and stated:

> This constitutes the statements in the broadcast which refers to Plaintiff's [Jones'] keeping a promise or not, and perhaps to his "honesty." If these statements are factual in nature they might be actionable. However, the Court finds that these statements are non-actionable opinion. (694 F.Supp. 1552.)

Such analysis has the potential to make "every statement of fact a statement of opinion in every case and therefore not actionable." Scott v. News Herald, supra, 496 N.E. 2d at 725. The standardless conclusion that language is "opinion," not "fact," also ignores recognition "that an

opinion may have as pernicious and harmful effect as other forms of defamation...." Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351, 1385 (Colo. 1983); McNamus v. Doubleday, 513 F.Supp. 1383 (S.D.N.Y. 1981).

A nebulous constitutional protection afforded "opinion" speech also permits the trial court to employ subjective, perhaps even biased, judicial understanding of a publication, which is unarticulated for purposes of appellate review. In Washington Post Co. v. Chaloner, 250 U.S. 290 (1919), this Court stated that if a statement is susceptible to two meanings, one libelous and another not:

> ...[I]t is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read.

See also, Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967); McBride

v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460, 1465 (D.C. Cir. 1983).

If the court makes an "inevitably arbitrary" conclusion that despite defamatory capability an assertion is one of "opinion" and not "fact," then a plaintiff whose reputation palpably may be hurt by the assertion is denied meaningful due process of law. Traditional notions of due process and fair play have called for the application of a legal standard which can be articulated and understood by persons of common intelligence. See, Galvan v. Press, 347 U.S. 522, 530 (1954).[4]

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[4]This Court stated in Paul v. Davis, 424 U.S. 693, 701 (1976) that harm to reputation alone in a case brought under 42 USC Section 1983 "apart from some more tangible interests such as employment" was not sufficient to invoke protection of the Due Process Clause. The more tangible interest at stake here is the threshold right of a litigant whose reputation has been tarnished or destroyed by a libeler to gain meaningful access to the court in the face of vague legal standards applied to the definition of an "opinion" versus "fact."

Paradoxically, the law of defamation always has looked to "the average normal and reasonable person of ordinary intelligence, in the community of publication..." to determine if a publication is capable of exerting reputational damage. See, e.g., Albert Miller Co. v. Corte, 107 F.2d 432, 435 (5th Cir. 1939); Diplomat Electronic, Inc. v. Westinghouse Electric Supply Co., 378 F.2d 377, 381-382 (5th Cir. 1967). This faith in the reader or viewer of common intelligence is undermined by the amorphous, turgid protection of "opinions," afforded constitutional dimension by the courts.

While there is a societal interest in "uninhibited, robust and wide-open debate" on issues of public concern [New York Times v. Sullivan, 376 U.S. 254, 270 (1964)], society has an equally important interest in protection of the self-esteem and reputation of its individual human beings. Justice

Stewart stated in his concurring opinion in Rosenblatt v. Baer, 383 U.S. 75, 93 (1966):

> . . . The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Individuals should not be left without recourse when false and defamatory statements damage their reputation. Jones should not have had his cause summarily terminated at its preliminary stage by the court's conclusion that a clearly defamatory broadcast, viewed nationwide, was nothing more innocuous than a non-actionable, non-defamatory expression of "opinions."

The more elusive the standards of free speech or press in libel cases, ironically the less protection afforded to free speech. Cf., Harte-Hanks Communications, Inc. v. Connaughton, _____ U.S. ___, 109 S.Ct. 2678

(1989). This Court held in Connaughton that the "purposeful avoidance of the truth" shows actual malice. Quoting Afro-American Pub. Co. v. Jaffe, 125 U.S. App. D.C. 70, 76, 366 F.2d 649, 655 (1966) (en banc), the Court recognized "the defamer may be the more successful when he baits the hook with truth." If purely defamatory statements "bait the hook" with alleged "opinions" the remarks are no less defamatory.

In Cianci v. New Times Pub. Co., supra, the court held an allegation imputing "specific criminal or other wrongful acts" was not insulated from liability because of characterization that the statement was only an "opinion." See, 639 F.2d at 64. Imputations of dishonest, unscrupulous or hypocritical acts or conduct are defamatory. See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, supra; Quartana v. Utterback, 787 F.2d 1297, 1301 (8th Cir. 1986);

Diplomat Electric, Inc. v. Westinghouse Electric Supply Co., supra, 378 F.2d at 381-82; Caswell v. Manhattan Fire & Marine Ins. Co., 399 F.2d 417, 420-421 (5th Cir. 1968). Under Florida law, applicable to this diversity case:

> ...Imputation of hypocrisy or dishonesty is as libelous, when veiled under words which mean that, as if made directly by the words themselves.

See Jones v. Greeley, 25 Fla. 629, 6 So. 448, 449 (1889).

Florida courts are as vigilant to flesh out a libel as the defamer may be to disguise it. See generally, Walsh v. Miami Herald Pub. Co., 80 So.2d 669 (Fla. 1955); Loeb v. Geronemus, 66 So.2d 241 (Fla. 1953); Richard v. Gray, 62 So.2d 597 (Fla. 1953); McClellan v. L'Engle, 74 Fla. 581, 77 So. 270 (1917); Carter v. Sterling Finance Co., 132 So.2d 430 (Fla. 1st DCA 1961).

Courts have recognized imputations of animal cruelty, abuse or neglect are defamatory. See Zartman v. Leheigh County Humane Society, 482 A.2d 266, 270 (Pa.Supp.Ct. 1984); Neary v. Regents of the University of California, 185 Cal.App. 3d 1136, 230 Cal. Rptr. 281 (1986).[5] On remand, Neary, a California rancher, recovered $7 million in his libel suit. The rancher had purchased 848 pregnant heifers and took them to his 20,000 acre ranch. Thereafter, 95 cattle and more than 400 calves died. The state, through its veterinarians, blamed Neary for inadequate care. Neary blamed the state for

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[5]A defamation plaintiff need not show prejudice in the eyes of all members of the community or his associates attributable to a libel. A substantial and respectable minority who would tend to be prejudicially influenced by a false publication is sufficient. Restatement (Second) of Torts Section 559 (1977); see also Afro-American Publishing Co. v. Jaffee, supra, 366 F.2d at 654, no. 10; McBride v. Merrell Dow and Pharmaceuticals, Inc., supra, 717 F.2d at 1465. There are an estimated 7,000 animal protection groups in the United States with combined membership of 10 million and budgets totalling $50 million. See, Newsweek Magazine, "The Battle Over Animal Rights," December 26, 1988, pages 50-57.

using a chemical spray, toxaphene, on the herd. Neary made statements imputing abuse of the animals to the state and its veterinarians on CBS' newsmagazine "60 Minutes." See, Traynor, "Defamation Law: Shock Absorbers For Its Ride Into The Groves Of An Academe," 16 Journal of College and University Law 373, footnotes 1 and 2 (Winter 1990).

The allegations of animal abuse of heifers made against Neary are no different than ABC's accusations that Jones was disbanding his herd of Zimbabwe elephants "to a fate worse than death." Indeed, the label of "opinion" could have been applied much more readily to the accusations against Neary because state veterinarians rendered "opinions" about Neary's treatment of the animals based on a "fact" investigation. This case and Neary are identical in the sense that "opinion" rested wholly on the

investigation of "facts" which the Plaintiff alleged were false and defamatory.

This Court recently expressed continuing disapproval of "slipshod and sketchy investigatory techniques" which manifest "an intent to avoid the truth." Harte-Hanks Communications, Inc. v. Connaughton, supra, 109 S.Ct. 2698-99. ABC's Caras was deeply involved with his good friend, Derby, in a contrived[6] story lambasting Petitioner, creating more "life and death" answers to slanted questions and a more obvious portrayal of Jones's callous disregard for his elephant herd.

ABC's plain message was that Jones was an avaricious "Entrepreneur" seeking to add to his already sizeable wealth at the ex-

---

[6]There was no urgency to the timing of the 1987 "sequel." Caras had plenty of time to seek out a de facto "expert" and Downs and Walters, sophisticated and renowned media personalities, knew the impact of their inflammable treatment of the "Save the Elephants" would be devastating.

pense of the elephant herd contrary to "the advertised intent when they were brought here" from Zimbabwe. The false imputation was one of fact, not opinion. The holding of the lower courts used "Humpty Dumpty's language" in reaching a contrary conclusion and deprived Petitioner of Due Process of Law.

"Save the Elephants" essentially broadcast the following false assertions of fact concerning Jones in the 1987 "20/20" program:

ABC Falsely Stated That Jones Did Not Keep His Word

> Downs [voice-over] And in 1984, these baby elephants walked into our hearts when 20/20 reported how this Florida millionaire airlifted them to safety. Now the herd must be disbanded, and their future is in doubt. Are we all at fault?
>
> Pat Derby, Elephant Expert: What we do to animals in general is not wonderful; what we do to elephants is horrible.
>
> Downs [voice-over]: Roger Caras asks if the dream has gone sour,

and why it's time again to save the elephants.

Walters: Well, later in this program, we'll follow up on the fate of some baby African elephants to whom a promise was not kept.

Downs: ..., but next, they say elephants never forget, but sometimes people, unfortunately, do. Roger Caras reports why it may be time once again to "Save the Elephants." Stay with us. [commercial break]

SAVE THE ELEPHANTS

Downs: It's been almost three years now since 20/20 first reported on this man, eccentric Florida millionaire and inventor of the Nautilus exercise machines, Arthur Jones, and his daring airlift rescue of a herd of baby African elephant marked for death. It was one of the most talked about segments we've done here. But, as ABC News nature and wildlife correspondent Roger Caras tells us, what we thought was the happy ending to this elephant story is actually, according to the experts, the beginning of a sad and painful journey.

Arthur Jones, Entrepreneur: I simply could not live with myself if I idly stood by and watched the African elephant become extinct.

Roger Caras [voice-over]: That's how Florida millionaire Arthur Jones explained his mission in 1984, when 20/20 first reported this story. Jones wanted to rescue baby elephants in Zimbabwe from a cull, or thinning of the herd, like this one. [videoclip of elephants being shot] This was the dramatic scene in 1984, when Jones took one of his three 707s across the Atlantic and into the heart of the African continent. His commitment seemed both emotional and financial. . . .

* * *

Mr. Jones: We're going to give them an opportunity to survive and to build a self-sustaining herd of African elephants in this country.

Caras [voice-over]: For two and a half years, the Zimbabwe orphans lived the good life here on Arthur Jones' estate in central Florida. But all of that's coming to an end. The herd is being dispersed. . . .

* * *

Ms. Derby: It's his responsibility. That herd was brought over here as a herd, and it should remain a herd.

* * *

Caras: Barbara, it's no different than going to a pound and adopting a dog or a cat. If you're rich enough to go to Africa and bring a herd of elephants then your responsibility [is] for the life of the animals, and elephants live 60 to 70 years. He's a very rich

> man. He should endow these animals, give them to a university, keep them together so they can be studied and they can be cared for long after he's dead and we're dead.
>
> * * *
>
> Walters: You know, we forget, isn't it cute, we're going to have all these elephants, and we're going to adopt these dogs or these cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's hope that something can be done about it.

ABC Falsely Branded Jones A Liar

Jones told ABC that he had lost legal control of his company and any elephants sold from the herd at Jumbolair had been sold by one Travis Ward during the time Ward controlled Nautilus.[7]

In its 20/20 broadcast, ABC duly recited Jones's statement and then proceeded to

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[7]Plaintiff was the founder of Nautilus. It started doing business in 1970. Jones developed and invented all of Nautilus's exercise equipment. He sold Nautilus to Ward to devote more time to revolutionary medical machines diagnosing lumbar problems and lower back injuries. Jones was preparing to introduce the products on the market place when ABC broadcast "Save the Elephants."

vouch for statements of Derby and Caras calling Jones a liar:

> Caras [voice-over]: But Ward says that they didn't control anything until August 1986. They never sold any elephants, and the agreements to sell them to a part-time animal dealer named David Meeks was signed by Jones' foreman, Ralph Kramer, in July.
>
> Ms. Derby: Ralph Cramer told me, when I was in Florida in May, that Arthur (Jones) had told him to dispose of as many of the elephants as he could.
>
> Caras [voice-over]: Jones says he doesn't know how many more he will sell.

ABC had the 16 June 1986 contract between Ward and Jones in its possession prior to the broadcast. The agreement to sell elephants to Meeks was signed by Cramer as "Nautilus Representative," not "Jones' foreman." Indeed, ABC flashed the agreement on the video portion of the broadcast at the same instant Caras stated on the audio voice-over that Jones says "he doesn't know

how many more he will sell." The agreement showed it was between Meeks and Nautilus. ABC also did not disclose Jones's intention to maintain a herd of 30 to 50 African elephants.

ABC Falsely Portrayed Jones As A Hypocrite

> Arthur Jones, Entrepreneur: I simply could not live with myself if I idly stood by and watched the African elephant become extinct.
>
> Roger Caras [voice over]: That's how Florida millionaire Arthur Jones explained his mission in 1984, when 20/20 first reported his story.
>
> Roger Caras [voice over]: . . .After a hair-raising 22 hour flight, they arrived at Jones's ranch for, it was assumed, the rest of their lives. At least, that was the impression Jones gave.
>
> * * *
>
> Mr. Jones: We're going to give them an opportunity to survive and to build a self-sustaining herd of African elephants in this country.
>
> Mr. Jones: You know, and sometimes I'm not even responsible for the past, Roger, don't try to hold me responsible for the future.

Caras [voice over]: . . . and Arthur Jones, commenting on elephant ownership in general, said the advice of Confucius might apply:

Mr. Jones: "He who chooses to ride the tiger should carefully determine in advance how he intends to dismount."

* * *

Walters: He who chooses to bring over a herd of elephants should carefully think of what he's going to do after he has them in his backyard, shouldn't he?

Caras: Barbara, it's no different than going to a pound and adopting a dog or a cat. If you're rich enough to go to Africa and bring a herd of elephants then your responsibility [is] for the life of the animals, and elephants live 60 to 70 years. He's a very rich man. He should endow these animals, give them to a university, keep them together so they can be studied and they can be cared for long after he's dead and we're dead.

* * *

Walters: You know, we forget, isn't it cute, we're going to have all these elephants, and we're going to adopt these dogs or these cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's hope that something can be done about it.

The fact was, as ABC knew at the time of the 1987 broadcast, that Jones had arranged to endow the elephant herd and have the University of Florida take care of them (Ex F, 138-139, 142). Caras told Derby that Jones had provided for the elephants in his will (Derby Dep. p. 166).

Underscoring ABC's defamatory and false assertions of fact was clear evidence of the network's "actual malice." From producer, Lynn Murray, to moderators Downs and Walters, to "wildlife" reporter, Caras, there was a pre-conditioned and determined intent to "get" Jones. Caras employed his friend, Derby, vouching for her pronouncements, to portray the Petitioner as the story's villain. Derby made the following devastating and derogatory statements about Jones:

Pat Derby, Elephant Expert:[8] What we do to animals in general is not wonderful; what we do to elephants is horrible.

These are extremely social animals. They live for each other, literally, and when you pull a baby elephant out of that situation, that's stressful in itself. I've known of elephants to die just from that.

So many dumped elephants become quote "rogues," because they're mishandled, they're the victims of improper diet, of every kind of atrocity in the world. Their only way to retaliate, they do one of two things, they either attack or they run.

Today, anyone with the money to purchase an elephant can get an elephant. There is no provision for quality of life. There is no provision for expertise. We have no, absolutely no, laws which protect the elephants or the people.

It's his responsibility. That herd was brought over as a herd, and it should remain a herd.

* * *

I really feel they should have been destroyed in Africa.

---

[8]Downs announced "according to the experts" the elephants faced "the beginning of a sad and painful journey." Derby was the only supposed expert.

> It's a quick death. They would have been with their own herd. They would not have known. To send them into anything else is not kind.

Derby was identified as an "Elephant Expert" only on the video portion of "Save the Elephants." Downs referred to her as "experienced elephant handler" on the audio. ABC failed to inform the viewer of Derby's true lack of expertise. Derby and Caras were good friends, calling each other "five or ten times" a year. Derby watched the 1984 program, did not like it, called the National Humane Society and objected (Derby Dep. 151, 152, 165).

Despite her continuing friendship and contacts with Caras, Derby testified that she had "no idea" how 20/20 producer Lynn Murray came to call her in California in 1987 to do an interview concerning the sale of some of the elephants at Jumbolair. ABC paid Derby's airfare to New York and her

hotel bill. After her interview with Caras for the show, Derby spent the weekend with Caras and his wife (Derby Dep., p. 77, 96-97, 123-124, 165-166, 176-178).

Although Derby stated that she knew of instances when elephants died just because they had been split from a herd, ABC did not tell its viewers that sometime prior to the broadcast, Derby arranged a swap with Jones, placing an elephant she had with the herd at Jumbolair in exchange for one of the baby elephants (Derby Dep., p. 102).

Derby admitted she was no elephant expert. She had never been to Africa, never studied elephants in a national habitat, and had never written a book or article about elephants (she had studied English literature at college but did not have a degree) (Dep. 17-19, 65-66).

Derby admitted that her solemn statement on 20/20 about knowing of [separated]

elephants dying from stress was based only upon what third persons allegedly told her, not on first-hand information or observation (Derby Dep., p. 27-34). According to Jones, Derby held herself out "as being totally inexperienced, totally lacking knowledge and seeking knowledge" concerning elephants (Jones Dep. 6/19/87, p. 52). None of this came out in the broadcast, only Derby's condemnation of Jones.

Ominous Letter From The Humane Society

Plaintiff's reputation was immediately harmed by the 20/20 broadcast. He received "hate" calls and letters from persons and organizations concerned about animal cruelty. On 22 April 1987, the Humane Society of the United States wrote him an ominous and threatening letter:

April 22, 1987

Arthur Jones
Jumbolair
P.O. Box 788
Anthony, FL 32617

Dear Mr. Jones:

We are writing to you concerning the recent 20/20 report dealing with the African elephants that are in your care.

The Humane Society of the United States (HSUS) recognizes your original humanitarian gesture of transporting this herd of African elephants to your private land in Florida. This attempt to preserve the lives of these animals was originally reported on the ABC news program 20/20.

However, it was brought to our attention by the March 12, 1987 20/20 report that you have begun to disband this herd by selling the animals to circuses in Mexico or to any other willing person. The HSUS and its members are deeply concerned with the welfare of these animals. We urge you to set up a endowment to guarantee that these beautiful animals can live out their lives on your property. Furthermore, we want to stress the need to begin resolving this problem as soon as possible.

We urge you again to take quick action to rectify this situation and look forward to an early response detailing your plans for the remaining African elephants.

Sincerely yours,

David I. Herbert
Captive Wildlife Specialist

The District Court concluded that ABC's assertion in "Save the Elephants" either were not defamatory or, if defamatory, were expressions of "opinions." Consequently, despite immediate harm to Jones, he was left unable to remedy the damage by "malleable and spongy" legal analysis enabling "any judge or reviewing court to label any clearly libelous statement of fact as a statement of opinion...." Scott v. News Herald, supra, 496 N.E.2d at 723. Like Milkovich presently under review in this Court, this case calls for the redefinition of the legal guidelines for distinguishing fact from the opinion. The economically powerful news media in the United states should not receive absolute immunity from lies and falsehood under the recurrent premise that any deliberate "hatchet job" it perpetrates on

an individual's reputation is constitutionally protected "opinion."

The ABC broadcast of "Save the Elephants," viewed in its entirety, and without any design to overlook its sting or to characterize portions of it as "opinion," not "fact," defamed the Plaintiff. The broadcast imputed dishonesty and hypocrisy. ABC accused Jones of "dumping" the elephant herd to "a fate worse than death." The Plaintiff was accused of exposing the herd to a doomsday future of improper diet, cruelty, mishandling and neglect, in short, to "every kind of atrocity in the world." The overall impact of "Save the Elephants" cannot be diluted by labeling it as an "opinion" of the libeler.

CONCLUSION

For the reasons stated, Petitioner prays that this Court grant this petition and determine that Jones had the legal right

to remedy the harm inflicted by ABC in "Save the Elephants" to Petitioner's good name, self-worth and reputation in this important libel case.

Respectfully submitted,

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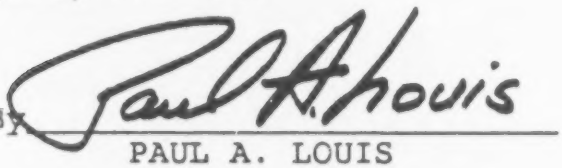
By 
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Of Counsel

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to Gregory G. Jones, Esq., Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A., One Harbour Plaza, P.O. Box 3239, Tampa, Florida 33601, on this 24th day of May, 1990.

By Paul A. Louis
PAUL A. LOUIS

No. _____

In The
Supreme Court of the United States

October Term, 1989

ARTHUR JONES

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.

Respondent,

Appendix To
Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Eleventh Circuit

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Arthur JONES, Plaintiff

v.

AMERICAN BROADCASTING COMPANIES, INC., Defendant.

No. 87-412-CIV-T-17(C).

United States District Court, M.D. Florida, Tampa Division.

Sept. 7, 1988.

ORDER ON MOTION FOR SUMMARY JUDGMENT

KOVACHEVICH, District Judge.

This cause of action is before the Court on Defendant's motion for summary judgment filed November 6, 1987, Plaintiff's response to issues 1, 3, and 5 filed April 15, 1988, and the court-ordered joint memorandum filed June 7, 1988.

The circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is

viewed in the light most favorable to the nonmoving party. *Sweat v. The Miller Brewing Co.*, 708 F.2d 655 (11th Cir.1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant*, 595 F.2d 994, 996-7 (5th Cir.1979), quoting *Gross v. Southern Railroad Co.*, 414 F.2d 292 (5th Cir.1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in *Celotex Corp v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. 477

U.S. at 322, 106 S.Ct. at 2552, 91 L.Ed.2d at 273.

The Court also said, "Rule 56(e) therefore requires that nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed. 2d at p. 274.

The complaint in this cause of action was filed March 24, 1987. The complaint seeks compensatory and punitive damages (one billion dollars in compensatory and three billion dollars in punitive damages) for an alleged defamatory program broadcast on Defendant's news program 20/20 on March 12, 1987. The complaint asserts that the news broadcasters of that program conspired to betray Plaintiff on national television and

to portray him as dishonest, a liar, and a man who is cruel to animals. Plaintiff asserts that the defamatory statements were made with malice and based on a conspiracy to destroy his reputation for truth and honesty.

On November 6, 19878, Defendant filed a motion for summary judgment, alleging there is no genuine issue of material fact and that summary judgment is appropriate. The following issues were presented by the motion for summary judgment:

1. Plaintiff must, but has failed to, specify the particular statements of fact in the broadcast that allegedly defamed him, offering instead a non-specific, "shotgun" condemnation that is, as a matter of law, insufficient.

2. Plaintiff has failed to prove by any evidence, much less by the requisite clear and convincing evidence,

that any statement made by Defendant was false.

3. The statements upon which Plaintiff purports to base his claim are not reasonably capable of a defamatory meaning.

4. Being a "public figure", Plaintiff must, but ha failed to, show that Defendant acted with "actual malice", that is, with knowledge that its statements were false or with reckless disregard for their truth.

5. The statements about which Jones complains were non-actionable opinion, which is protected absolutely by the First Amendment.

Plaintiff, thereafter, filed a motion to compel certain discovery:

1. all original out tapes, or all original videotape films, made in the

production of "Save the Elephants", March 12, 1987;

2. copy of the videotape of the entire program 20/20 for March 12, 1987;

3. all notes, memoranda, written documents, original handwritten correspondence, used by any staff or employee in the preparation of the program "Save the Elephants";

4. all original out tapes, or all original videotape films made in the production of the segment "The Flying Elephants", broadcast in 1984;

5. copy of the videotape of the entire 1984 20/20 program containing the segment "The Flying Elephants";

6. all notes, memoranda, written documents, original handwritten correspondence, used by staff or employees, in the preparation of the segment "The Flying Elephants";

7. copies of all notes, memoranda and correspondence between ABC and Pat Derby with respect to the program "Save the Elephants" from January 1, 1986, through the date of the motion;

8. copies of all original handwritten notes, inter-office memoranda, and other documents prepared by Barbara Walters, Hugh Downs, and Roger Caras in preparation of the program "Save the Elephants" from the date the program was first conceived through the date of the motion, exclusive of correspondence to any attorney subsequent to on or about March 16, 1987;

9. copies of original telephone logs reflecting calls between agents, officers, or employees of ABC with respect to the preparation and showing of the program "Save the Elephants", as well as any documents, notes, or other memo-

randa reflecting returned or original phone calls;

10. copies of all correspondence, notes, or memoranda received by ABC as a result of the broadcast of the program "The Flying Elephants" in 1984; and

11. copies of all letters, telegrams, or other written documents received by ABC as a result of the broadcast of the program "Save the Elephants" on March 12, 1987.

On november 6, 1987, Defendant filed a suggestion to the court, in the nature of a request for protection, regarding discovery. Defendant offered to provide videotapes and transcripts, of the broadcast in question, at Plaintiff's request and expense. Defendant moved the court to deny any other discovery at that point, as the case was clearly frivolous. Defendant, additionally,

filed an opposition to the motion to compel and again moved the court to deny further discovery until the resolution of the motion for summary judgment.

A hearing was held by Magistrate Jenkins on the motion to compel December 9, 1987. On January 29, 1988, Magistrate Jenkins issued her order on the pending discovery matters. The order determined that three (3) of the issues of the summary judgment motion presented issues to which the discovery sought by Plaintiff had no relevance, specifically issues one, three, and five. The order directed Plaintiff to respond to those three issues of the motion for summary judgment and deferred ruling on the motion to compel pending resolution of issues one, three, and five of the motion for summary judgment.

On February 8, 1988, Plaintiff filed a pleading entitled "Objections to or Petition

for Hearing on appeal of Magistrate's Order and Memorandum of Law." On march 22, 1988, this Court denied Plaintiff's objections to the magistrate's order and affirmed her ruling that issues one, three, and five of the motion for summary judgment resolved prior to subjecting the parties to extensive and expense discovery that is of no relevance to those issues.

FINDINGS OF FACT

The following findings of fact are relevant to the disposition of the motion for summary judgment, some are the undisputed findings delineated by the parties in the court-ordered joint memorandum:

1. The Court has jurisdiction over the subject matter of this cause based on diversity of citizenship, pursuant to 28 U.S.C. § 1332.

2. American Broadcasting Companies, Inc. (hereafter ABC) broadcast the March 12,

1987, segment of the news magazine 20/20 entitled "Save the Elephants," include the "lead-ins," that are issues in this case.

3. Plaintiff Arthur Jones is the millionaire inventor of the Nautilus exercise machines. Plaintiff claims the segment in question constitutes defamation; the complain states that he has "deservedly" built a national and international reputation as an entrepreneur and inventor of medical and exercise equipment, which has been sold to hundreds of thousands of purchasers throughout the world. Plaintiff also states he has previously enjoyed an excellent reputation as author of hundreds of articles on the topics of exercise, muscle structure, strength training principles, flexibility and metabolic condition, and rehabilitation or injuries; these articles have been published throughout the world.

4. The Court finds that over the years Plaintiff has invited media attention and has been the subject of repeated medica coverage, including coverage in such publications as the *Wall Street Journal, Newsweek, Business Week, Forbes, Playboy,* and *Time.* (Ex. B, pgs. 1-21). At one point, Plaintiff was the subject of a report on the television program "Lifestyles of the Rich and Famous." Subsequent to that program, it was reported that Plaintiff intended to sue the host of that program, Robin Leach, and was quoted as saying, "Leach 'is a malicious liar ...'" (Ex. B., pg. 16).

5. The coverage of Plaintiff has not been limited to his business affairs, but has also covered aspects of his personal life. Some aspects of his personal life that have been reported by the media are; 1) Jones packs an antique Colt 45 at al times; 2) Jones "gulps coffee by the pot an fast

food by the bagful, chain smokes, and nibbles constantly from bowls of Hershey's Kisses and cheese puffs scattered about his office"; 4) each of Plaintiff's wives, five total, have been 16 to 20 years old at the time they wed; 5) Jones "... has told his children they will never see any of his fortune, 'Leaving it to people destroys them.'"; 6) tales of Jones days as a big game hunter; 7) the animals that he houses on this farm, which have included a gorilla, a pair of rhinoceroses, Galapogos turtles, African elephants, snakes, and crocodiles; and 8) his bottom line "... So I would like to live as long as possible and mind my own business and do things that matter - younger women, faster airplanes, and bigger crocodiles." (Ex. B,pgs. 1-21).

6. On March 16, 1987, by letter, demanded Defendant retract the contents of

the broadcast. The retraction demand letter is attached as Exhibit C of the complaint.

7. Exhibit B to the complaint is a true and correct videotape copy of a portion of the March 12, 1987, "Save the Elephants" segment of the 20/20 broadcast, which is the basis of the complaint herein. The first two "lead-ins" to the segment are not a part of Exhibit B. The complaint makes no allegation that these "lead-ins" are defamatory; they were first referred to in the April 15, 1988, response to the motion for summary judgment. Exhibit C to the motion for summary judgment is a written transcript of the segment in question.

8. Exhibit 16, Plaintiff's Appendix, is a true and correct copy of the entire broadcast of the 20/20 news program for March 12, 1987. This tape contains portions which are not claimed to be defamatory.

9. In 1984, Plaintiff transported sixty-three (63) baby African elephants from Zimbabwe to his Ocala, Florida, property aboard a 707 jetliner. Plaintiff purchased the elephants from Zimbabwe to prevent them from being killed in a ":cull" of the elephant herd. Defendant broadcast a segment on its news program 20/20 entitled "The Flying Elephants". This news segment followed the efforts of Plaintiff to purchase the baby elephants and transport them to the Ocala property.

10. The herd resided on Plaintiff's estate Jumbolair until on or about July 21, 1986, when the elephants began to be dispersed pursuant to an agreement signed with David Meeks of the Little Mountain Zoological Park, in Inman, South Carolina.

11. The following is the transcript of the March 12, 1987, broadcast of the segment "Save the Elephants", including the lead-ins

to the segment (material not related to this segment has been omitted and the omission is indicated by the use of asterisks):

Hugh Downs: Good evening, I'm Hugh Downs.

Barbara Walters: And I'm Barbara Walters. And this is 20/20.

* * * * * *

Downs (voice over): * * * * and in 1984, these baby elephants walked into our hearts when 20/20 reported how this Florida millionaire airlifted them to safety. Now the herd must be disbanded, and their future is in doubt. are we all at fault?

Pat Derby, Elephant Expert: What we do to animals in general is not wonderful; what we do to elephants is horrible.

Downs (voice over): Roger Caras asks if the dream has gone sour, and why its time again to save the elephants.

* * * * * *

Walters: Well, later in this program, we'll follow up on the fate of some baby African elephants to whom a promise was not kept. * * * *

* * * * * *

Downs: * * * *, but next, they say elephants never forget, but sometimes people, unfortunately, do. Roger Caras reports why it may be time once again, to "Save the Elephants." Stay with us.

SAVE THE ELEPHANTS

Downs: It's been almost three years now since 20/20 first reported on this man, eccentric Florida millionaire and inventor of the Nautilus exercise machines, Arthur Jones, and his daring airlift rescue of a herd of baby Afri-

can elephants marked for death. It was one of the most talked about segments we've done here. But, as ABC News nature and wildlife correspondence Roger Caras tells us, what we thought was the happy ending to this elephant story is actually, according to the experts, the beginning of a said and painful journey.

> *Arthur Jones,* Entrepreneur: I simply could not live with myself if I idly stood by and watched the African elephant become extinct.

Roger Caras (voice over): That's how Florida millionaire Arthur Jones explained his mission in 1984, when 20/20 first reported this story. Jones wanted to rescue baby elephants in Zimbabwe from a cull, or thinning of the herd, like this one. [videoclip of elephant being shot] This was the dramatic

scene in 1984, when Jones took one of his three 707s across the Atlantic and into the heart of the African continent. His commitment seemed both emotional and financial. He paid Zimbabwe $750 for every baby elephant they let him save. Sixty-three badly frightened babies were loaded up and then, as the sun began to set, Jones had to round up his people.

> *Mr. Jones:* Buck, take that damn vehicle and run over and tell those people to get here now.

Caras (voice over): Since the African airstrip had no lights, a delay in takeoff would mean no takeoff, because the pilot was afraid of other wild animals wandering out onto the strip. The crew was also worried about whether the plan would lift off at all, with 40,000 pounds of elephants aboard.

Finally airborne, the tension in the cockpit eased, even if the elephants in the cargo bay were not convinced. all night long, the ghostly figures of the handlers moved around, as they tried to calm the babies. After a hair-raising 22 hour flight, they arrived at Jones' ranch for, it was assumed, the rest of their lives. At least, that was the impression Jones gave.

Mr. Jones: We're going to give them an opportunity to survive and to build a self-sustaining herd of African elephants in this country.

Caras (voice over): For two and a half years, the Zimbabwe orphans lived the good life here on Arthur Jones' estate in central Florida. But all of that's coming to an end. The herd is being dispersed. Pat Derby is an experienced elephant handler. She says splitting

up the herd is a terrible mistake, that nature intended elephants to live in family groups.

> *Pat Derby,* Elephant Expert: These are extremely social animals. They live for each other, literally, and when you pull a baby elephant out of that situation, that's stressful in itself. I've known of elephants to die just from that.

Caras (voice over): And just how big was and is the Ocala herd? The 63 that were brought from Zimbabwe joined 33 Jones already had from another source, 96 elephants total. Not the typical American home. Twelve of those died of a variety of problems, but considering what they'd gone through, that isn't that had a result. It should b made clear that Jones' elephants got the

very best care from keepers and veterinarians. Eighty-four elephants, then, survived. But there are only 53 there now. That means 31 have gone someplace, Jones says the elephants were sold by someone else, while he was selling his business, Nautilus Sports Medical Industries, Incorporated, to Ward International Corporation.

> *Mr. Jones:* I lost total control of all my assets. Things were done in the way of disposing of elephants during the time that I was nct in control that I simply couldn't prevent.

Caras (voice over): But Ward says they didn't control anything until August 1986. They never sold any elephants, and the agreement to sell them to a part-time animal dealer named David

Meeks was signed by Jones' foreman, Ralph Cramer, in July.

Ms. Derby: Ralph Cramer told me, when I was in Florida in May, that Arthur had told him to dispose of as many of the elephants as he could.

Caras (voice over): When the elephants do leave Florida, this is their first stop, the Little Mountain Zoological Park, in Inman, South Carolina. It's here that their conditioning and training begins for the lives that have been chosen for them. David Meeks runs this private zoo, and although the animals appear well while they are here, the elephants don't get to stay here. Meeks says he tries to find good homes for the elephants, but good homes are hard to find for animals who may be 12 feet tall, weigh eight to ten tons and

be able to walk through concrete walls. And what kinds of homes has Meeks chosen so far? Three elephants, at least, went to private individuals a pets. Eight to small animal parks and circuses not checked out by Meeks. The sales were made over the telephone. And one to an animal trainer who Meeks himself admitted to 20/20 uses cruel training techniques. All these are perfectly legal transactions. The problem is, an elephant, once stripped of its herd, dumped so to speak, will become extremely dangerous if not properly handled.

Ms. Derby: So many dumped elephants become quote "rogues," because they're mishandled, they're the victims of improper diet, of every kind of atrocity in the world. Their only way to

retaliate, they do one of two things, they either attack or they run.

David Meeks, Animal Dealer/Trainer: When I sell it, I try to make a decision at that time if it's going to a good place, and I want to know that that person is going to be okay, okay? I can't tell, if he comes here in one day, if he's okay or not. But if this guy is USDA-licensed, someone has said that he's okay other than himself.

Caras (voice over): There are a few problems with that theory. First, are USDA elephant licensing standards are minimal at best. Second, they are too understaffed to do very many meaningful inspections. Finally, private owners who don't exhibit their animals are exempt from regulations.

Ms. Derby: Today, anybody with the money to purchase an elephant can get an elephant. There is no provision for quality of life. There is no provision for expertise. We have no, absolutely no, laws which protect the elephants or the people.

Caras: I don't imagine a baby elephant has the kind of mind that harbors expectations, but if one did, I don't think that any one of the elephants David Meeks sold expected to end up here, in Davenport, Florida, at the Liebel Family Circus. But one was sent here. It died just after a few months. Mr. Liebel's previous elephant died too. As recently as December, the USDA inspection found this place suitable for elephants. Mr. Liebel agreed to meet us at his circus' winter headquar-

ter,s but when we arrived, he wasn't to be found. We discovered later that he was in Inman, South Carolina, picking up yet another baby elephant from David Meeks.

(voice over) One important consideration: the elephants Jones brought from Africa are African, a species with almost no history of working with man. They tend, according to most experienced handlers, to be tricker and less reliable than their Asian cousins, the elephants we're used to seeing in most zoos and circuses. Arthur Jones' staff is experienced, but what happens when they aren't around. After all, elephants can live up to 70 years.

Mr. Jones: You know, and sometimes I'm not even responsible for the past, Roger, don't try to hold me responsible for the future.

Ms. Derby: It's his responsibility. That herd was brought over as a herd, and it should remain a herd.

Mr. Jones: It was never our intention to keep them all, it was impossible; but if we could have saved them, certainly no harm done.

Ms. Derby: I really feel they should have been destroyed in Africa. It's a quick death. They would have been with their own herd. They would not have known. To send them into anything else is not kind.

Caras (voice over): Jones says he doesn't know how many more he will sell, what the optimum herd size may be. Taking responsibility for 96 elephants, a herd that at maturity would

weight between 850 and 900 tons, require 4600 gallons of drinking water and 32,000 pounds of food a day, could be likened to climbing onto a tiger, and Arthur Jones, commenting on elephant ownership in general, said the advice of Confucius might apply.

> *Mr. Jones:* "He who chooses to ride the tiger should carefully determine in advance how he intends to dismount."

Walters: He who chooses to bring over a herd of elephants should carefully think of what he's going to do after he has them in his backyard, shouldn't he?

Caras: Barbara, it's no different than going to a pound and adopting a dog or a cat. If you're rich enough to go to Africa and bring a herd of elephants then your responsibility [is] for the life of the animals, and ele-

phants live 60 to 70 years. He's a very rich man. He should endow these animals, give them to a university, keep them together so they can be studied and they can be cared for long after he's dead and we're dead.

Walters: What would it cost?

Caras: Millions, but he's got millions - $5 million, $10 million. And if not, maybe someone in the audience will come up with the money, but clearly, they should not be dissipated like that. We just got word that six more are being sent to a circus in Mexico. It's a fate worse than death.

Walters: You know, we forget, isn't it cute, we're going to have all these elephants, and we're going to adopt these dogs or these cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's

hope that something can be done about it.

* * * * * *

LEGAL ISSUES

The parties in the court-ordered joint memorandum stated the following to be the undisputed issues of law in this cause of action:

1. Under Florida law, in order for the statements upon which Jones bases his complaint to be actionable, those statements must be reasonably capable of a defamatory meaning.

2. The determination of whether the statements made in the broadcast are reasonably capable of a defamatory meaning is a question of law for the Court to decide.

3. The entire broadcast should be considered by the Court in determining whether, in the context of the broadcast,

the statements made are reasonably capable of a defamatory meaning as to Plaintiff.

4. The determination of whether the statements attacked are protected statements of opinion is also a question of law for the Court to decide.

5. Plaintiff bears the burden of identifying particular statements in the broadcast, demonstrating that those statements are reasonably capable of a defamatory connotation, and demonstrating that the statements are fact rather than opinion. Summary judgment is proper if there exists no genuine issue as to any material fact.

At this time, the Court is addressing only three of the five issues presented in the motion for summary judgment; those being issues 1, 3, and 5. The parties agree that the following constitutes the issues of law which the Court must resolve:

1. Whether Plaintiff has identified specific statements in the broadcast that defame him?

2. Whether the statements made in the broadcast are reasonably capable of a defamatory connotation?

3. Whether the statements made in the broadcast are protected statements of opinion and thus nonactionable?

4. Whether the "out-takes" of the March 12, 1987, broadcast are relevant in any way to the issues currently before the Court?

In *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686 (1964), the Supreme Court explicated a standard for defamation cases involving public officials. The New York Times published a political advertisement endorsing civil rights demonstrations in Alabama by black students and by implication condemned the performance of

local law enforcement. A police commissioner filed suit and demonstrated in state court that certain statements in the ad referred to him and that they constituted libel per se under Alabama law. Defendant Times was left with the single defense of truth. The United States Supreme Court concluded that "a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech. Id., at 279, 84 S.Ct. at 725. The court said:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless

disregard of whether it was false or not. Id., at 279-280, 84 S.Ct. at 726.

The Court three years later in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, '87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) extended the constitutional privilege to defamatory criticism of "public figures." Mr. Justice Brennan in the majority opinion of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), extended the privilege even further to included defamatory falsehoods relating to private persons where the statements concerned matters of general or public interest. The plurality opinion was joined by Justices Burger and Blackmun. Justices Black and White concurred in the judgment, in separate opinions, and Justices Harlan, Marshall, and Stewart dissented.

Further modification of the privilege was had in *Gertz v. Robert Welch, Inc.*, 418

U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The Court there stated:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other idea.s But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robuts, and wide open" debate on public issues. (cite omitted) They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed

by the social interest in order and morality." (cite omitted)

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolution of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." (cite omitted) And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing

the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *new York Times Co. v. Sullivan, supra,* 376 U.S., at 279, 84 S.Ct., at 725: "Allowance of the defense of truth, with the burden of proving it on the defendant, doe not mean that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue ...

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate (state) interest in redressing wrongful injury ...

In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. (cite omitted) To that end this Court has extended a measure of strategic protection to defamatory falsehood.

The *New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that*

the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. (footnotes omitted) Id., at 339-342, 94 S.Ct. at 3007-3008.

Gertz went on to conclude that the States should retain substantial latitude in their efforts to enforce legal remedies for defamatory falsehoods injurious to private individual. So long as they do not impose liability without fault, each state may define the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods relating to private individuals. Id., at 346-347, 94 S.Ct. at 3010-3011. As to public figures, the breathing space referred to in *Gertz* is provided by "a constitutional rule that allow public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made

with the requisite level of culpability." *Hustler Magazine v. Falwell*, ____ U.S. ____, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). To be true "it is not essential that the literal truth be established in every detail as long as the article contains the gist of the truth as ordinarily understood." *Orr v. The Argus-Press Co.*, 586 F.2d 1108, 1112 (6th Cir.1978).

It is a question of law, for the trial judge rather than a jury, as to whether or not the statements at issue are facts or non-actionable opinion, and, if fact, whether they are reasonably capable of a defamatory meaning. *Diplomat Electric, Inc. v. Westinghouse Electric Supply Co.*, 378 F.2d 377, 382 (5th Cir.1967). There is a distinction between pure opinion and a mixed expression of opinion. Pure opinion is based on facts set forth in the broadcast or publication, or facts that are otherwise

known or available to the reader or listener as a member of the public. Mixed opinion is based on facts relating to a person or his conduct that are neither stated in the publication or broadcast nor assumed to exist by a party exposed to the communication. Rather, the communication "implies" that a concealed or undisclosed set of defamatory facts would confirm his opinion. Pure opinion is protected by the First Amendment; mixed opinion is not. *Hay v. Independent Newspaper, Inc.*, 450 So.2d 293 (Fla. 2d DCA 1984). If a statement is susceptible to two interpretations, one defamatory and one not, a jury should determine whether the statement is defamatory. *Hallmark Builders, Inc. v. Gaylord Broadcasting*, 733 F.2d 1461, 1463 (11th Cir.-1984).

Designation as a public figure may be based on two different bases. Some individ-

uals achieve such pervasive fame or notoriety that they become a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *Gertz*, at 351, 94 S.Ct. at 30-12. It is for the trial judge, not the jury, to determine whether or not a plaintiff is a public figure. *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238, 1255 (5th Cir.1980. In establishing limited public figure status the Eleventh Circuit Court of Appeals has adopted a three-part analysis. A court must 1) isolate the public controversy, 2) examine plaintiff's involvement in the controversy, and 3) determine whether "the alleged defamation [was] germane to the plaintiff's participation in the controversy." *Long v. Cooper*, 848 F.2d 1202, 1204 (11th Cir.1988);

Silvester v. American Broadcasting Company, Inc., 839 F.2d 1491 (11th Cir.1988).

ISSUE: WHETHER PLAINTIFF HAS IDENTIFIED SPECIFIC DEFAMATORY STATEMENTS?

When the publication under scrutiny is television broadcast, the script must be evaluated in its totality, considering all the words used and not merely a particular phrase or sentence. The words and images should be taken together, because each is an important element of the nature of the publication. *Silvester v. American Broadcasting Companies, Inc.*, 650 F.Supp. 766, 770 (S.D.Fla.1986), aff'd, 839 F.2d 1491 (11th Cir.1988).

The Court must also, however, distinguish between an overall *defamatory impact* and a particular *defamatory implication*. A defamatory implication, which might be actionable, is a combination of individual statements which in themselves may not be

defamatory and which may be literally accurate, but, when combined, might lead the reader to draw an inference that is damaging to Plaintiff. *Herbert v. Lando*, 781 F.2d 298, 307 (2d Cir.1986). Where the defamatory implications of the specific statements and the overall impact of the broadcast are the same it a meaningless gesture to allow the plaintiff to rest his cause of action on the "overall impact" of the broadcast. In that instance, the plaintiff is required to specifically identify those statements which he claims are defamatory and may not rely solely on the "overall impact" to establish the alleged defamation. Id. at 307-308.

The cause of action presents a situation where the alleged defamatory impact of the broadcast is the same as the alleged defamatory implication of the allegedly defamatory individual statements. Plaintiff is required to identify the specific defama-

tory statements. Plaintiff asserts that he has sufficiently identified the alleged defamatory statements. (see pgs. 11-22 of Plaintiff's response to issues 1, 3, and 5 of Defendant's motion for summary judgment). The Court agrees and will therefore address the remaining two issues presented in the present motion for summary judgment.

ISSUE: WHETHER THE STATEMENTS MADE IN THE BROADCAST ARE REASONABLY CAPABLE OF A DEFAMATORY CONNOTATION AND/OR NON-ACTIONABLE OPINION?

Plaintiff asserts that the broadcast as a whole, as well as specific identified statements, implies that he is a liar, a cheat, dishonest, a man who breaks promises, an animal abuser, a hypocrite, a wacky screwball, inhumane, and that he acted with ulterior motives. (joint memorandum, pg. 9).

It is the Court's role to determine initially, as a matter of law, if the statements in this broadcast are "reasonably capable of a defamatory interpretation." A statement may be defamatory if it "tends to subject one to hatred, distrust, ridicule, contempt or disgrace." *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 716 (11th Cir.1985). In determining if the statement(s) are reasonably capable of a defamatory meaning, the Court must examine how a reasonable person would have interpreted the statements. The language of the publication should not be given a tortured interpretation but should be construed as the common mind would understand the statement. *Diplomat Electric*, 378 F.2d at 381-382.

[1] As to several of Plaintiff's contentions, in particular that the program implied he was an animal abuser, a wacky

screwball, cheat, and acted with ulterior motives, the Court finds that no statement, nor indeed the broadcast as a whole, implies, implicates, or attributes these alleged defamatory impressions to Plaintiff. Indeed, the broadcast makes it clear that when the elephants were in the care and control of Plaintiff they "got the very best care from keepers and veterinarians.: Any implication, if there was such implication, that the elephants might be abused could not reasonably be construed to refer to Plaintiff. There is nothing in the broadcast, in whole or by individual statement, that implies that Plaintiff had ulterior motives for either rescuing the elephants or for later dispersing a portion of the herd, if indeed he dispersed the herd.

[2] As to the "wacky screwball" complaint, the Court finds that such a defamatory meaning can not reasonably be construed

from the broadcast. A one point Hugh Downs refers to Plaintiff as an eccentric millionaire. Eccentric is not inherently derogatory or unflattering; it refers to one who deviates from an established pattern, rule or norm. The terms wacky and screwball refer to someone who is "crazily eccentric", "absurdly eccentric" or "irrational." The Court would have to take a "tortured" route to find that the broadcast in question casts Plaintiff in such a light as a "wacky screwball" and would b reasonably interpreted as defamatory to Plaintiff in that regard. *Webster's 7th New Collegiate Dictionary*, (1967). (See *Skolnick v. Nudelman*, 95 Ill.App.2d 293, 237 N.E.2d 804, 810 (1968) where the terms "nut," "mishunginer," and the like were found to be "name-calling" but not defamatory.)

The term "cheat" refers to someone who "deprives of something of value by the use

of deceit or fraud." *Webster's 7th.* The Court finds that the broadcast, either in whole or in part, is not reasonably capable of the defamatory interpretation that Plaintiff is a "cheat."

[3] The remaining "implications" asserted by Plaintiff as defamatory are that Plaintiff is "dishonest"; this assertion encompasses the assertion that they imply he is a liar, a hypocrite, and a man who breaks promises and inhumane. The broadcasts contains the following statements:

> *Walters*: Well, later in this program, we'll follow up on the fate of some baby African elephants to whom a promise was not kept.
>
> *Caras*: * * * * After a hairraising 22 hour flight, they arrived at Jones' ranch for, it was assumed, the rest of their lives. At least, that was the impression Jones gave.

This constitutes the statements in the broadcast which refers to Plaintiff's keeping a promise, or not, and perhaps to his "honesty." If these statements are factual in nature they might be actionable. However, the Court finds that these statements are non-actionable opinion. The second quoted statement is clearly the opinion of Roger Caras that he "assumed" and his "impression" of Jones was that the elephants would stay at the Jones' ranch forever. The statement does not imply "concealed or undisclosed set of defamatory facts" which would confirm that opinion. In context, of the broadcast it is clear that the first quoted statement is also non-actionable opinion and is in fact opinion based on the contents of the broadcast itself, rather than any set of "undisclosed" defamatory facts.

[4] Plaintiff's final assertion to be addressed is whether the broadcast, in whole or in part, is reasonably capable of the defamatory interpretation that Plaintiff is "inhumane." The Court has carefully reviewed the printed transcript and the many hours of videotape submitted by the parties in regard to this motion for summary judgment. Based on all that the Court has read and seen, it finds that the broadcast, as a whole or in part, is not reasonably capable of a defamatory interpretation that Plaintiff is inhumane and/or is nonactionable opinion.

Much of the broadcast consists of nonactionable opinion based either on facts set forth in the broadcast or otherwise known or available to the public, i.e. expert opinion, Pat Derby's opinion as to the preferable fate of the elephants. Much of the broadcast is substantially true, i.e. the

herd brought from Zimbabwe was being at least partially dispersed, the elephants were going to various environments, at least one of the elephants died in its new environment, Ralph Cramer signed the document selling some elephants to David Meeks, Jones is a millionaire.

Taken in context and without giving the broadcast any "tortured" interpretation, the Court finds that a reasonable person would not have interpreted the broadcast, in whole or in part, as being defamatory to Plaintiff. Applying the reasonable person standard, the Court finds the following interpretation is reasonable in context or the entire broadcast.

Plaintiff brought sixty-three (63) baby elephants from Zimbabwe in 1984 to protect them from being killed in a cull. Plaintiff appeared to others to be committed to saving the elephants, both emotionally an finan-

cially. Plaintiff is a millionaire. Although Plaintiff did not say so directly, some people were under the impression that Plaintiff intended to keep the elephants on his ranch "forever." Plaintiff denies that was ever his intention, as it was infeasible from the beginning. The elephants received excellent care and treatment while they were on Plaintiff's ranch.

At some point in time, the herd of sixty-three (63) elephants began to be sold to David Meeks of Little Mountain Zoological Park, Inman, South Carolina. Plaintiff contends that the sale was consummated at a time he was not in control of the elephants or the rest of his assets because he had sold them to ward International. Ward International denies it was in control at the time of the sale and that it every sold any elephants. The bill of sale for some elephants was executed by Ralph Cramer, the

foreman of the ranch, and David Meeks. David Meeks' private zoo is where the elephants are first taken after sale. There they are trained and readied to go on to new owners, including circuses, zoos, and private owners. At least one of the elephants died after it was sold by Meeks to a small circus. Plaintiff had no control over the elephants after they were sold, and according to his own statements had no control over their sale.

In the opinion of some, including Pat Derby "expert elephant handler" the "dumped" elephants may become problems if they are not properly handled after they leave the herd. Ms. Derby's opinion is that the elephants would have been better off being left to the cull than having the herd separated. It is also the opinion of Roger Caras that life for an elephant in a circus in Mexico is a fate worse than death. Ms.

Derby, as well as Roger Caras and Barbara Walters, are of the opinion that Plaintiff should have assumed responsibility for the elephants forever and keep the herd together. Mr. Caras thinks Plaintiff should endow the herd with some of his millions. The Court, as a matter of law, finds that this "reasonable person" interpretation of the broadcast in question is not reasonably capable of a defamatory meaning that Plaintiff is inhumane. A more reasonable interpretation is that some people, including a person who has experience with elephants, feel that Plaintiff should have kept all the elephants and somehow endowed their future, because the next owner of the elephant(s) might not provide as good a home as Plaintiff had in his ownership. Accordingly, it is

ORDERED that Defendant's motion for summary judgment on issues 1, 3, and 5 be

granted and this cause of action be dismissed with prejudice.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3925

D.C. Docket No. 87-412-CIV-T-17C

ARTHUR JONES,

Plaintiff-Appellant,

versus

AMERICAN BROADCASTING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(December 21, 1989)

Before TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-39

ARTHUR JONES,

Plaintiff-Appellant,

versus,

AMERICAN BROADCASTING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion December 21, 1989, 11 Cir., 19__, _____ F.2d _____).

Before TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority

of the judges in active service not having voted in favor of it,

Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3925

D.C. Docket No. 87-412-CIV-T-17C

ARTHUR JONES,

Plaintiff-Appellant,

versus

AMERICAN BROADCASTING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(December 21, 1989)

Before TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1

"Costs taxes against plaintiff-appellant."

Judgment Entered: December 21, 1989
For the Court: Miguel J. Cortez, Clerk

By: /S/
Deputy Clerk

ISSUED AS MANDATE:

Show #710

ABC NEWS

7 West 66th Street, New York, NY 10023

Transcripts: Journal Graphics, Inc.
2 John Street, New York, N.Y. 10038

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20/20

March 12, 1987

HUGH DOWNS.....Host

BARBARA WALTERS.....Host

"Loans for Sale"

JANET KLEIN..... Producer

JOHN STOSSEL.....Correspondent

Special thanks to Paul Nutter,

Better Business Bureau, Las Vegas, Nevada

Ken Thomberg, Better Business Bureau,

Boise, Idaho

"Blown Out of the Water"

CHRIS HARPER..... Producer

LYNNSHERR.....Correspondent

"Save the Elephants"

LYNN MURRAY..... Producer

ROGERCARAS.....Correspondent

"Magic Motion Man"

NOLA SAFRO..... Producer

HUGHDOWNS.....Correspondent

Additional video courtesy of WJACT-TV, Johnstown, PA

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Transcript produced by Journal Graphics, Inc., New York, NY

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March 12, 1987

HUGH DOWNS: Good evening, I'm Hugh Downs.

BARBARA WALTERS: And I'm Barbara Walters. And this is 20/20.

ANNOUNCER: On the ABC newsmagazine, 20/20, with Hugh Downs and Barbara Walters:

DOWNS [voice-over]: Tonight, fishing for business, boating for pleasure - if you do it in these California waters, beware.

CHRIS BLANDSFIELD, Witness: I realize that we were under siege, with - the area we were in was being bombed.

DOWNS [voice-over]: Surprise war games with live shells may have destroyed this fishing boat and killed its crew. Lynn Sherr unravels a mysterious danger at sea, one that could get you "Blown Out of the Water."

WALTERS [voice-over]: Plus, desperate American farmers and struggling small businessmen, they've answered these ads in hopes of

getting loans to save their lives. 20/20 goes under cover to reveal the unkindest con of all.

TOM ORMISTON, Assistant Attorney General, Iowa: If I had no moral scruples, this'd be my job.

WALTERS [voice-over]: John Stossel, shows us the men who may be out to bankrupt the American dream with "Loans for Sale" that are too good to be true.

DOWNS [voice-over]: And in 1984, these baby elephants walked into our hearts when 20/20 reported how this Florida millionaire airlifted them to safety. Now the herd must be disbanded, and their future i in doubt. Are we all at fault?

PAT DERBY, Elephant Expert: What we do to animals in general is not wonderful; what we do to elephants is horrible.

DOWNS [voice-over]: Roger Caras asks if the dream has gone sour, and why it's time again to save the elephants.

[Raisins singing: I heard it through the grapevine...]

WALTERS [voice-over]: And we heard it through the grapevine. America is crazy for this commercial and these little guys. We'll go behind the genius of Claymation and the fascinating filmaker who brings it all to life, "The Magic Motion Man."

Loans For Sale

DOWNS: Tonight we begin with a story about American farmers and small businessmen desperately searching for loans. Now, most of us at one time or another have really needed a loan, but there are times when we should beware, and what you're going to see tonight is one of those times. It's selfish, shocking, infuriating, but what you're about to see does happen.

WALTERS: It certainly does, doesn't it, Hugh? [voice-over] After countless loan rejections and heartache, thousands of these desperate farmers and business men have jumped at these kinds of ads from so-called loan brokers. Men who say they represent private investors offering loans for a fee. And how do they work out? John Stossel investigated if, indeed, it was too good to be true.

JOHN STOSSEL [voice-over]: Farmers all across the country are trying desperately to hold on to their farms, searching for one more loan, just enough money to keep going until the economy turns around.

JOHN ERNST, Yuma, Colorado: That's all I know, is farming. I farmed all my life.

STOSSEL [voice-over]: John Ernst needed money to save his farm. His son, Kent, thought he could save his father's land if he could just find a lender.

KENT ERNST, Yuma, Colorado: I thought, boy, you know, I could keep the farm in the family. I thought that would be really great. You know, I've lived here all my life, and I really hated to see the ground disappear.

STOSSEL [voice-over]: Their neighbors, John and Denise Stroup also needed money.

JOHN STROUP, Yuma, Colorado: I asked to refinance machinery and pay the bank off.

DENISE STROUP, Yuma, Colorado: Farming's a good life, and it's the last thing we want to do is give it up.

STOSSEL: Now, if you need to borrow money, where do you go? Well, banks and finance companies lend, of course, but there's that old saying that they'll only lend you money if you don't need it. And there's some truth to that, in that the bank wants collateral. It wants to be certain that you can pay it back. If you can't provide that

assurance, you may have to go to a private investor, and that's what thousands of struggling farmers have been doing.

[voice-over] The Stroups and Ernsts felt they'd found their private investor when, in their copy of Farm Futures magazine, they noticed this ad from D.C. Financial. They called and were told that D.C. had access to millions of dollars and would fly an executive to Colorado to meet with them.

MS. STROUP: Well, we thought it was a good deal, because we had dealt with these other guys already, and none of them would ever come and look at our equipment, and we were real excited, because he came down and he'd seen us in person.

JOHN ERNST: The story that he brought to us was so real, the interest and where he could get the money, and-

STOSSEL [voice-over]: They say they were told the loans were theirs, $300,000 for the Ernsts, $800,000 for the Stroups. All they had to do was pay a loan fee, $3,500.

KENT ERNST: Money is hard to come by around here, but when you're desperate, and when you're back's against the wall, you're going to dig a little deeper, and you're going to find that.

STOSSEL [voice-over]: They paid the fee and waited.

KENT ERNST: It always ended up we always had to call him back and ask him what's happening, and it was - you know, it's the same old story, "Well, I have these people look at this, and it looks really good, and let me get back to you within a couple of days."

STOSSEL [voice-over]: It's now a year later. Neither couple's received any money. The Stroups, now further in debt, are losing their farm equipment. The Ernsts have lost

their farm. Now, they work for neighbors and most days walk past the land they used to own.

[on camera] We know of eight other farms who've paid loan fees to D.C.Financial. Not one got a loan. Illinois' attorney general is now suing the company, but the experts tell us that with this kind of scheme, people seldom get their money back.

[interview] Does this happen often?

TAM ORMISTON, Assistant Attorney General, Iowa: It's going on every day in every state. It's just constant. Everybody needs money, particularly in the Midwest.

STOSSEL [voice-over]: Tam Ormiston investigates loan frauds for the state of Iowa.

[interview] What's the sales pitch?

MR. ORMISTON: The sales pitch is one that has complete allure to it. It's music to a farmer's ears. They call up after being rejected from every other lender, and

they're told that there are sources of money available, that they're offshore, they're European trusts and-

KEN POWERS: I'm the authorized agent of the chairman of a large international trust firm.

STOSSEL [voice-over]: Ken Powers - he's the man in the suit - has been operating in Idaho. He's known to have taken at least $170,000 from Idaho farmers. With the help of the Boise Better Business Bureau, we installed hidden cameras in one farmer's house, so you could hear hear his sales pitch.

MR. POWERS: We deal in billions of dollars every day, every single day, and we manipulate those funds to create huge windfalls for those people-

STOSSEL [voice-over]: The experts tell us there are certain things to listen for in just about any sales pitch for an advanced

fee loan scheme. We heard many of them here. First, they often say, "We've got tons of money."

MR. POWERS: Come to us, we're the best-

WOMAN: They'll be more impressed [unintelligible].

MR. POWERS: Oh, my goodness, yes, money's no problem.

STOSSEL [voice-over]: Clue number two:

MR. ORMISTON: The terms are always fantastic, particularly low interest rates.

MR. POWERS: A lot of the people want to know why we could come out here and loan money at six percent, even -

MAN: Uh huh.

MR. POWERS: - when we could put it on the money market at eight or nine or whatever. We're not interested in the money market. What we're interested in doing is addressing the farm system.

MR. ORMISTON: And these wonderful connections, these unbelievable connections -

MR. POWERS: We're involved in energy programs, we're involved in the Star Wars program, we're involved in mining, we're involved in banking -

STOSSEL [voice-over]: But, above all, I'm interested in you.

MR. POWERS: I'm a farm people, I'm an American citizen, and I really do honestly feel - and you can put it with a grain of salt, any way you want to take it- that unless we do something for the farmers, this country's going to heck in a basket.

MR. ORMISTON: I've always believed in the values of the American farmer and I want to help you." Boy, as soon as somebody comes and tells me that they're a good Christian or that they want to help me, I check my wallet immediately.

STOSSEL [voice-over]: Powers was vague about a lot of things, but he did make some claims we could check. For example -

MR. POWERS: - a prime holder of the Nestles stock is one of our board members.

STOSSEL [voice-over]: Not according to Nestles.

MR. POWERS: Well, we're involved very heavily with the Pentagon and the - a lot of the refurbishing.

STOSSEL [voice-over]: The Pentagon said it has no idea what Powers is talking about. Of course, most farmers don't know that and, desperate for the loan, many pay the fee; in this case, $15,000.

MR. POWERS: $15,000 is going to be an investment program that's going to make you money and may make you a lot of money.

STOSSEL: Can they come up with $5,000, $10,00 - a case we just did, $68,000?

MR. ORMISTON: Yes, they can, because they contact friends and family and ask for that help.

STOSSEL [voice-over]: Powers is being sued by the state of Idaho. He's fighting the suit. I don't know if he's still collecting advance fees. He wouldn't talk to us.

MR. ORMISTON: In our state, we're estimating something like $4 million every year goes into this kind of economy. It's a great business.

STOSSEL: And it's not just farmers who have lost money, small business people have been hooked too, lured in by ads in newspapers and magazines. "Financing available. Venture capital. Specializing in start-ups. Capital - $100,000 to $100 million. Call the Euro Group." The Euro Group took $5,000 from Roy Lerman. Lerman spent two year

developing a special type of metal and last year was ready to start producing it. He just needed a lender. Euro Group said. "No problem."

ROY LERMAN, Great Neck, Long Island: They said they had two that definitely wanted to do it, and they were sending it to three others.

STOSSEL [voice-over]: So you were excited?

MR. LERMAN: I was thrilled. I thought it was accepted.

STOSSEL [voice-over]: So Roy flew to Las Vegas to meet with them. And Roy wasn't the only person to come here. Dozens of people from all across the country paid their own fare to Las Vegas because Euro Group told them "Yes, your business is a good one, and we know people who want to lend money to you." Don Mitchell needed $3 million to start an oil business.

[interview] Why did you think that Euro Group would give it to you?

DON MITCHELL, Mt. Pleasant, Texas: Because they said they would. They said they had it.

STOSSEL: All you had to do was give them $5,000.

MR. MITCHELL: Right, that was my earnest money, in other words, to show that I was sincere and that I wanted the money.

STOSSEL: So you gave it to them.

MR. MITCHELL: I gave it to them.

STOSSEL: And what did you get?

MR. MITCHELL: Nothing. Absolutely nothing.

STOSSEL [voice-over]: We wanted to hear Euro Group's sales pitch, so we asked this businesswoman to wear a hidden microphone to her meeting at Euro Group's Las Vegas headquarters. The Euro Group's salesman raved about her loan proposal.

SALESMAN [over hidden microphone]: It's good. It's well done. It's very well done.

STOSSEL [voice-over]: And then she asked:

BUSINESSWOMAN: Where does the money come from?

SALESMAN: Okay, the money comes from U.S. based lenders. It's not dirty money. We're not affiliated with the mafia. We deal with, like Citibank; we deal with first Interstate Bank; we deal with Bank of America; we deal with credit union money, different, like Merrill Lynch Securities money.

STOSSEL [voice-over]: Well, we checked into that. Merrill Lynch said it's never done any business with them. Citibank, Bank of America and First Interstate said they don't deal with loan brokers.

[on camera] We've talked to 20 people who gave $2,000-$5,000 to this company. all

were told, "Your business is great. The loan money will be coming soon." Not one received a loan.

[voice-over] Company president Thomas DaVito[?] - that's him with the cigarette - say he'd talk to us about this, but later canceled the interview. Complaints like this are not new to Mr. DaVito and some of his colleagues. They used to work for a company called American-European Group that was run by Mr. DaVito's brother. That's the brother in front. He was recently indicted for - surprise! - collecting loan fees and then not coming through with loans. Now, many customers felt there was no risk in paying the loan fee because:

MR. LERMAN: They keep telling you that they'll refund it.

STOSSEL: They'll refund it if...

MR. LERMAN: If they don't raise the money.

STOSSEL: They told you that.

MR. LERMAN: Absolutely.

STOSSEL [voice-over]: They promised Don Mitchell a refund too, so when Don returned to Las Vegas to get his refund, we went along. I wanted to talk to Mr. DaVito, but apparently that wasn't possible. Instead, this man came downstairs and told us:

MAN: But at this time, we just can't have this right now.

STOSSEL: Well, I just want to make sure that he doesn't want to tell his side of the story.

MAN: Oh, he does want to tell his side of the story. I'm sure he will later -

STOSSEL [voice-over]: But Mr. DaVito did later write us a letter, but as far as talking to him, no luck.

MAN: At this time, I can't have you come here while we're open for business.

STOSSEL: We would just like to film Mr. Mitchell, who is here to get his money back.

MAN: Not here.

STOSSEL [voice-over]: In his letter, Mr. DaVito tells us his only contractual obligation to his customers is to put them in contact with a lender. Now, as far as we know, the only lender he puts anyone in touch with is a company called Alcor Business Capital. But Euro Group's customers say Alcor just asks for more money and doesn't make loans. Now, we talked to Alcor. It says, "We do make loans," but wouldn't tell us to whom. "That is confidential," they said. We did get a hold of Alcor's annual reports for the years 1983 to '85. Under number of loans, it shows not one was made. Mr. DaVito also denies misleading customers. He says many loans don't go through because the customer's business

proposals are unrealistic. But Don Mitchell still hoped to get his $5,000 back. We waited outside until he finished talking to them. Did he get his refund? No.

MR. MITCHELL: That was ridiculous talking to that bunch of thugs in there.

STOSSEL: What did they say?

MR. MITCHELL: They said, "Take it to your attorney."

MR. ORMISTON: It's the greatest job I can imagine. You know, if I had no moral scruples, this would be my job. You can make a tremendous amount of money. In one case I did, for example, $750,000 in a little under three months. Now, that's not bad. Now, what's the risk? And I mean, it's now like you have to pick up a gun and go in and knock off a gas station and go to jail for over 40 year, no.

STOSSEL: It's your job to catch them. Can you catch them?

MR. ORMISTON: We can go after them for fraud. We can get injunctive relief. We get a nice little piece of paper that says, "you can't come into our state anymore and make these representations." That's what they do. Now, is that a big threat to your way of life? That leaves you with only 49 other states to go to, doesn't it?

STOSSEL: Are any of these loan deals legitimate? Do people ever get the money?

MR. ORMISTON: All I can say is that I have yet to see the case where it did succeed.

DOWNS: Yes, but John, aren't there people who can, legitimately, help you to get a loan?

STOSSEL: Yeah, I think he's overstating the point a bit. There are legitimate loan brokers, but typically they'll work for the hour, they'll charge you that way, or they'll collect their fee when you get the loan. It comes out of the loan in the form

of points. It's when you pay this up-front fee-

DOWNS: Yeah.

STOSSEL: -that you have to watch out.

DOWNS: That should ring an alarm bell.

STOSSEL: It should.

DOWNS: I can see how a state attorney general might have - might not be able to do much about this, but why can't we cat as a nation, I mean, with federal laws.

STOSSEL: The FBI could do something. It's just not a priority. It's white collar crime. Plus the victims often don't report it, that they're embarrassed that this happened to them. They don't want to talk abut it, or they're still hoping that the loan might in the future come through, and they don't want to jeopardize that, so they don't tell.

DOWNS: Thank you, John. Barbara?

WALTERS: Well, later in this program, we'll follow up on the fate of some baby African elephants to whom a promise was not kept. But, next, danger at sea. Even in the calmest waters, the unexpected can happen. Lynn Sherr and a mystery that could get you "Blown Out of the Water." after this.

[Commercial break]

Blown Out of the Water

WALTERS: Imagine this scene: you're out in the popular waters off the California coast when suddenly you find yourself in the middle of real Navy war games with live ammunition. But this is not an imaginary scene, this actually happened, and it could happen again. As Lynn Sherr tells us, it may have already caused one tragedy, and it has certainly caused a heated stand-off between heartbroken fisherman and the might of the U.S. Navy.

LYNN SHERR [voice-over]: It rises out of the Pacific Ocean some 50 miles off the coast of San Diego, San Clemente Island, a bleak stretch of rock and scrub inhabited mainly by a heard of goats. But the waters surrounding this rugged 26-mile strip sustain some other forms of life with the three very different sets of goals. To the sport and commercial fishermen who earn their living from the bounty off its shores, San Clemente provides to many varied species, it's the basis for a $20-million fishing industry. To the pleasure boaters in the increasingly heavy traffic of the southern California coast, San Clemente is a safe harbor. But it is also a U.S. Naval Reservation, and to the U.S. military, which owns the island and has used it for target practice since World War II, it's a vital part of this nation's defense system. For two generations, the

fishermen and the boaters and the Navy have coexisted peacefully, until now.

DAVE TIBBLES, Fisherman: It's bad out here. I know exactly how bad out here. This place, San Clemente Island, with the Navy here, is an accident place waiting for a time to happen, and there's a lot of people going to be killed here if somebody doesn't do something about it soon.

SHERR [voice-over]: It has already happened. One Friday afternoon last February, the fishing boat, the Cindy Fay, left from San Pedro, California, carrying her captain, Boyd Reber, and his crewman, Frank Germano. Destination: San Clemente Island, in search of soup tin shark. By Tuesday, they were anchored some 300 feet off the western shore of the island, where they set out their nets [on camera] What happened next is unclear. There were no eye witnesses, but lawyers for Boyd Reber's family say the Cindy Fay was

blown up here at San Clemente Island by some sort of weapon fired by the U.S. military. Reber's body was found in the ocean a week later. Frank Germano's body washed up on the beach. And the United States government denies all responsibility for the deaths of the two men.

[voice-over] One key question raised by the deaths of Reber and his crewman in this: does the Navy give adequate warning at San Clemente Island when it's about to start firing? This is the standard notice provided to fishermen and pleasure boaters and informing them of the dangers at sea each week. And here under San Clemente Island it says, "Shore bombardment intermittently on a daily basis." It's been saying that for as long as anyone can remember. When we called the telephone listed here to get more detailed information, there was no answer. But when we got to the island, this was what

we found. At first light, Navy patrols started chasing boats out of Pyramid Cove, the island's southern harbor.

LOUDSPEAKER: - clear the range immediately.

SHERR [voice-over]: But that was the first warning we'd had that they'd be shelling where we'd anchored overnight. Keep in mind the island is open to everyone until the Navy decides to hold exercises, and we discovered that any warnings are given only minutes before the firing begins. In fact, in the six hours it took us to reach Pyramid Cove from San Diego, we tried four times to reach the Navy on our powerful radio without success. It was only when we were a mile offshore that we got this very explicit response.

NAVY RADIO: It looks like we're going to be hot all day. Right now, all we have available is to tie up the vicini-

ty of Pyramid Head and I say again, we're hot.

SHERR [voice-over]: In other words, almost no part of the island was safe from the four dangerous exercises taking place. And there's something else. During the maneuvers, naval ships usually maintained radio silence, so it's virtually impossible to find out what they intend to do, and most fishing and sporting boats don't show up on Navy radar. On the day they died, Boyd Reber and Frank Germano were working the waters on the west side of the island, an area not classified by the Navy as either dangerous or restricted. That's why Boyd's fisherman friends blame the Navy for killing their friend, either with an errant shell fired during the exercises or with a live shell left on the ocean floor. Reber's closest friend, Tim Houshar, says he was just too cautious for any other explanation.

TIM HOUSHAR, Family Friend: There's no way that this was a normal boating accident, because he was too safety-conscious, and he valued his safety and other people's safety above and beyond anything. He was a good fisherman, a real good fisherman. He was an extremely jolly person, he was a happy person, probably loved life more than anybody I know, loved his family - I think Cindy was the only girlfriend he ever had, his wife. Courtney, Courtney, his daughter, was everything to him, everything. He was a hell of a guy.

SHERR [voice-over]: Boyd Reber's death left his widow, Cindy, to take care of five-year-old Courtney in the house outside San Diego, where the family had just moved. She told us she was used to Boyd's fishing trips and had no apprehension when he set out for San Clemente Island last February.

CINDY REBER, Widow: I worried about him driving on the freeways home after a fishing trip, being tired - that was my concern. I never worried about him fishing. He called me on the 23rd and was very excited because he had done well that day.

SHERR: What did he say?

MRS. REBER: He said, "We're really tired. We've been working all day." This was seven o'clock at night. He said, "We're still working, but we got 'em."

SHERR [voice-over]: That was the last time she ever spoke to her husband.

MRS. REBER: And then, there was a call that day. They had found some debris, and - [breaks down] all I could think about was, it's just not true. They've made a mistake.

SHERR [voice-over]: Cindy Reber has filed a $10.8 million lawsuit against the U.S. Navy, because she thinks it is responsible for her husband's death. The initial Coast Guard

conclusion was that the two men died when the Cindy Fay ran aground. According to these internal documents obtained by 20/20, the U.S. Navy did send a search party to find the wreckage of the Cindy Fay, those pieces they collected ere later discarded without explanation. And while the autopsy reports shows that Boyd Reber drowned, the medical examiner found that Frank Germano died instantly from internal injuries. Germano's death is not consistent with the Coast Guard's finding that the boat ran up on the rocks. There are other possibilities. First, that the boat got hit by U.S. Navy gunfire. 20/20 has learned that there were two Navy destroyers, the U.S.S. Fife and the U.S.S. Elliott, firing live ammunition - five-inch artillery shells - on the day Reber and Germano are believed to have been killed. The destroyers were located off the southeast coast of the island. The

Cindy Fay was several miles away, on the opposite side of the island. The firing began at 7:30 in the morning, and it startled another boater anchored in Pyramid Cove, which is in between the destroyers and Reber's boat. He said he got no warning by radio or from the patrol boat that the Navy was going to start shelling.

CHRIS BLANDSFIELD, Witness: I was awaken by a shell whistling over the top of our vessel, as we were anchored in Pyramid Cove, and I realized that we were under siege, with - the area we ere in was being bombed. Not being able to see any ships on the horizon, not being able to see anything at all other than the shells exploding on the beach and the sound of them whistling overhead, we were - obviously, all of us were very frightened, and we were in a - you know, near state of panic.

BARRY CAPPELLO, Attorney: This is about three to five miles from where Boyd Reber was fishing, and we believe one of those destroyers overfired and hit the back of Boyd's boat, exploding.

SHERR [voice-over]: The attorney representing Boyd Reber's family places the blame squarely on the Navy.

MR. CAPPELLO: The Russians weren't off the coast of San Clemente firing, the Japanese haven't been off the coast firing since World War II, the only agencies that we know that are using ammunition are the United States government.

SHERR: So what you're saying is that some branch of the United States Armed Forces is guilty.

MR. CAPPELLO: Absolutely. Certainly they have a right to test their Naval ammunition. Certainly they have a right to practice. And certainly they should be testing Cruise

missiles and the various armaments that they need, but for God's sake, don't do it negligently, don't kill people, and they don't try to cover it up.

SHERR [voice-over]: These documents obtained by 20/20 show that a U.S. Navy oil tanker reported an explosion near the sight where Reber's boat was later found, but the Coast Guard dismissed that report and didn't seriously investigate whether the Cindy Fay was, indeed, hit by Navy shells. And these internal documents obtained by 20/20 show that the Navy says it's unlikely the boat was hit by their gunfire. They do allow that the boat was within maximum range of the two destroyers that day, but the Navy argues that the likelihood the Cindy Fay was blown out of the water by one of their guns is very remote. There is a second possibility. Did the Cindy Fay accidentally pull up a live shell left on the ocean floor from

past exercises at San Clemente? That's the sort of suspicion that led Boyd's friends to start their own investigation into what really happened.

MR. TIBBLES: I just wasn't getting any answers from anybody. The Cost Guard, they told me basically, he just went up on the beach. They said they were going to have the Navy come out and help. They said they were going to supply helicopters, they were going to do all this work. They did nothing. Boyd's friends came through for him.

SHERR [voice-over]: On his own, at the helm of his fishing boat. Dave Tibbles collected some friends who were divers and went out to the spot where the debris had been found. There they recovered fragments of the Cindy Fay floating in the water and lying on the ocean floor and strewn across the beach. They hired an explosives expert to examine the pieces from the boat, and he concluded

that a massive explosion, not a boating accident, was the cause. First clue? These badly bent net posts.

CRAIG PLOSS, Explosives Expert: This net post, when recovered by the divers, evidenced a thirty-degree bend in it, which would indicate some large, massive force was required to do that, in that this is a -

SHERR [voice-over]: Far more force than a gasoline or propane explosion aboard the Cindy Fay. More evidence of a huge explosion, the screws recovered from the boat are angled in the same direction.

MR. PLOSS: This piece of fiberglass is all that remains of the bottom hull of the aft section of the boat. These - there are five wood screws here. They're bent uniformly at a 90-degree angle, which would evidence the direction of the blastway. It's consistent with my analysis that the explosion occurred somewhere under the boat in the aft section.

I would have to say, given the location, that the boat was destroyed, it is very possible that it was some sort of military explosives.

SHERR [voice-over]: These internal U.S. Navy documents obtained by 20/20 show that the officer in charge of the San Clemente range indicated it is possible that live shells from past exercises remain on the ocean floor. In other words, the Navy apparently has no system for sweeping up unexploded shells from the open waters around the island. As Reber's friends suspect, the Cindy Fay may have picked up one of those shells in her shark nets.

[on camera] We asked the Navy for an interview to discuss the charges made by Boyd Reber's attorney. They refused. We also asked for permission to observe the safety features they follow at the San

Clemente range. They refused that also, saying, "The matter is now in the courts."

[voice-over] The attorneys for Reber's widow and daughter say it makes no difference whether the boat was accidentally fired on by a destroyers or hauled in a live shell. They contend the U.S. government is responsible for the deaths of the two men and for failing to investigate fully what happened. And in such a civil suit, they only have to prove that the U.S. Navy was negligent. But Cindy Reber wants something else to happen at San Clemente Island.

MRS. REBER: Well, they're definitely going to have to make some changes out there. I don't want this to happen to one of my friends. We've already been through it once. Let's not let it happen again.

WALTERS: Lynn, when you were in those waters, were you afraid?

SHERR: I was, actually, based on what we had seen and what I had heard, but you know, Barbara, some of the fishermen are not afraid. They're saying, "It's perfectly safe out there." They say they would not be risking their own lives if they thought it was dangerous. They think the Navy is doing its job and that this was just a freak one-in-a-million accident.

WALTERS: So, they're willing to take the chance, day after day.

SHERR: Well, they are, but there's another motive, too. Part of the problem is that they are concerned that this case and the publicity around it may force the navy to close San Clemente Island down completely to pleasure boaters and to fishermen, and that could mean the end of their $20 million industry.

WALTERS: And that's the economics of it.

SHERR: Absolutely, there' a lot at stake.

WALTERS: Thank you, Lynn. Keep us informed. Hugh?

DOWNS: You know, I've thought about that kind of danger in certain water,s but I never realized that it really happened until this story. Very - thank you, Lynn. Well ,later I'm going to show you the secrets of some very hot raisins, and one of America's best-loved commercials, but next, they say elephants never forget, but sometimes people, unfortunately do. Roger Caras reports why it may be time once again, to "Save the Elephants." Stay with us.

[Commercial break]

Save the Elephants

DOWNS: It's been almost three years now since 20/20 first reported on this man, eccentric Florida millionaire and inventor of the Nautilus exercise machines, Arthur Jones, and his daring airlift rescue of a herd of baby African elephants marked for

death. It was one of the most talked about segments we've done here. But, as ABC News nature and wildlife correspondent Roger Caras tells us, what we thought was the happy ending to this elephant story is actually, according to the experts, the beginning of a said and painful journey.

> ARTHUR JONES, Entrepreneur: I simply could not live with myself if I idly stood by and watched the African elephant become extinct.

ROGER CARAS [voice-over]: That's how Florida millionaire Arthur Jones explained his mission in 1984, when 20/20 first reported this story. Jones wanted to rescue baby elephants in Zimbabwe from a cull, or thinning of the herd, like this one. [videoclip of elephants being shot] This was the dramatic scene in 1984, when Jones took one of his three 707s across the Atlantic and into the heart of the African continent. His

commitment seemed both emotional and financial. He paid Zimbabwe $750 for every baby elephant they let him save. Sixty-three badly frightened babies were loaded up and then, as the sun began to set, Jones had to rush to round up his people.

MR. JONES: Buck, take that damn vehicle and run over and tell those people to get here now.

CARAS [voice-over]: Since the African airstrip had no lights, a delay in takeoff would mean no takeoff, because the pilot was afraid of other wild animals wandering out onto the strip. The crew was also worried about whether the plane would lift off at all, with 40,000 pounds of elephants aboard. Finally airborne, the tension in the cockpit eased, even the elephants in the cargo bay were not convinced. All night long, the ghostly figures of the handlers moved around, as they tried to calm the babies.

After a hair-raising 22 hour flight, they arrived at Jones's ranch for, it was assumed, the rest of their lives. At least, that was the impression Jones gave.

> MR. JONES: We're going to give them an opportunity to survive and to build a self-sustaining herd of African elephants in this country.

CARAS [voice-over]: For two and a half years, the Zimbabwe orphans lived the good life here on Arthur Jones' estate in central Florida. But all of that's coming to an end. The herd is being dispersed. Pat Derby is an experienced elephant handler. She said splitting up the herd is a terrible mistake, that nature intended elephants to live in family groups.

PAT DERBY, Elephant Expert: These are extremely social animals. They live for each other, literally, and when you pull a baby elephant out of that situation, that's

stressful in itself. I've known of elephants to die just from that.

CARAS [voice-over]: And just how big was and it the Ocala herd? The 63 that were brought from Zimbabwe joined 33 Jones already had from another source, 96 elephants total. Not the typical American home. Twelve of those died of a variety of problems, but considering what they'd gone through, that isn't that bad a result. It should be made clear that Jones' elephants got the very best care from keepers and veterinarians. Eighty-four elephants, then, survived. But there are only 53 there now. That means 31 have gone someplace. Jones says the elephants were sold by someone else, while he was selling his business, Nautilus Sports Medical Industries, Incorporated, to Ward International Corporation.

MR. JONES: I lost total control of all of my assets. Things were done in the way of

disposing of elephants during the time that I was not in control that I simply couldn't prevent.

CARAS [voice-over]: But Ward says they didn't control anything until August 1986. They never sold any elephants, and the agreements to sell them to a part-time animal dealer named David Meeks was signed by Jones' foreman, Ralph Kramer, in July.

MS. DERBY: Ralph Kramer told me, when I was in Florida in May, that Arthur had told him to dispose of as many of the elephants as he could.

CARAS [voice-over]: When the elephants do leave Florida, this is their first stop, the Little Mountain Zoological Park in Inman, South Carolina. It's here that their conditioning and training begins for the lives that have been chosen for them. David Meeks runs this private zoo, and although the animals appear well while they are here, the

elephants don't get to stay here. meeks says he tries to find good homes for the elephants, but good homes are hard to find for animals who maybe 12 feet tall, weigh eight to ten tons and be able to walk through concrete walls. And what kinds of homes has Meeks chosen so far? Three elephants, at least, went to private individuals a pets. Eight to small animal parks and circuses not checked out by Meeks. The sales were made over the telephone. And one to an animal trainer who Meeks himself admitted to 20/20 uses cruel training techniques. All these are perfectly legal transactions. The problem is, an elephant, once stripped of its herd, dumped so to speak, will become extremely dangerous if not properly handled.

MS. DERBY: So many dumped elephants become quote "rogues," because they're mishandled, they're the victims of improper diet, of

every kind of atrocity in the world. Their only way to retaliate, they do one of two things, they either attack or they run.

DAVID MEEKS, Animal Dealer/Trainer: When I well it, I try to make a decision that time if it's going to a good place, and I want to know that that person is going to be okay, okay? I can't tell, if he comes here in one day, if he's okay or not. But if this guy is USDA-licensed, someone has said that he's okay other than himself.

CARAS [voice-over]: There are a few problems with that theory. First, the USDA elephant licensing standards are minimal at best. Second, they are too understaffed to do very many meaningful inspections. Finally, private owners who don't exhibit their animals are exempt from regulations.

MS. DERBY: Today, anybody with the money to purchase an elephant can get an elephant. There is no provision for quality of life.

There is no provision for expertise. We have no, absolutely no, laws which protect the elephants or the people.

CARAS: I don't imagine a baby elephant has the kind of mind that harbors expectations, but if one did, I don't think that any one of the elephants David Meeks sold expected to end up here, in Davenport, Florida, at the Liebel Family Circus. But one was sent here. It died just after a few months. Mr. Liebel's previous elephant died too. As recently as last December, the USDA inspector found this place suitable for elephants. Mr. Liebel agreed to meet us at his circus's winter headquarters, but when we arrived, he wasn't to be found. We discovered later that he was in Inman, South Carolina, picking up yet another baby elephant from David Meeks.

[voice-over] One important consideration: the elephants Jones brought from

Africa are African, a species with almost no history of working with man. They tend, according to most experienced handlers, to be tricker and less reliable than their Asian cousin, the elephants we're used to seeing in most zoos and circuses. Arthur Jones' staff is experienced, but what happens when they aren't around. After all, elephants can live up to 70 years.

MR. JONES: You know, and sometimes I'm not even responsible for the past, Roger, don't try to hold me responsible for the future.

MS. DERBY: It's his responsibility. That herd was brought over here as a herd, and it should remain a herd.

MR. JONES: It was never our intention to keep them all, it was impossible; but if we could have saved them, certainly no harm done.

MS. DERBY: I really feel they should have been destroyed in Africa. It's a quick

death. They would have been with their own herd. They would not have known. To send them into anything else is not kind.

CARAS [voice-over]: Jones says he doesn't know how many more he will sell, what the optimum herd size may be. Taking responsibility for 96 elephants, a herd that at maturity would weight between 850 and 900 tons, require 4600 gallons of drinking water and 32,000 pounds of food a day, could be likened to climbing onto a tiger, and Arthur Jones, commenting on elephant ownership in general, said the advice of Confucius might apply.

MR. JONES: "He who chooses to ride the tiger should carefully determine in advance how he intends to dismount."

WALTERS: He who chooses to bring over a herd of elephants should carefully think of what he's going to do after he has them in his backyard, shouldn't he?

CARAS: Barbara, it's no different than going to a pound and adopting a dog or a cat. If you're rich enough to go to Africa and bring a herd of elephants then your responsibility [is] for the life of the animals, and elephants live 60 to 70 years. He's avery rich man. He should endow these animals, give them to a university, keep them together so they can be studied and they can be cared for long after he's dead and we're dead

WALTERS: What would it cost?

CARAS: Millions, but he's go the millions - $5 million, $10 million. And if not, maybe someone in the audience will come up with the money, but clearly, they should not be dissipated like that. We just got word that six more are being sent to a circus in Mexico. It's a fate worse than death.

WALTERS: You know, we forget, isn't cute, we're gong to have all these elephants, and we're going to adopt these dogs or these

cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's hope that something can be done about it.

CARAS: Thank you, Barbara, thank you, Hugh.

DOWNS: Yeah, thanks Roger. Well, next, how do you mold a perfect television commercial? I'm going to tell you how these little guys get all the right moves from "The Magic Motion Man" when we come back.

[Commercial break]

The Magic Motion Man

DOWNS: There's no need now to hear it through the grapevine. It seems almost everyone is wild about these Raisins and their hip sales pitch. This commercial was voted the best of 1986 by several publications, and it has set Madison Avenue on its ear. But how is it done? Well, there has always been a fascination to bringing clay to life, and now, with an amazing process

called Claymation, artist and animator Will Vinton is changing the look of everything from music videos to pizza commercials. But just remember, it all begins with clay, so don't throw away your Playdough.

WILL VINTON, Producer/Director: And it's using clay figures in claysets, and using all the filmmaking tools we have available to us to create an illusion, bringing things to life.

DOWNS [voice-over]: Will Vinton has shaped quite a schedule for himself and for the characters that inhabit his quirky worlds. They pop up in music videos.

MAX COGNITO: No? Okay, well then there's McArthur he had his shorts - oh, he looked so good -

DOWNS [voice-over]: In this short film, stand-up comic Max Cognito is the ultimate impressionist.

MR. COGNITO: I shall return.

CHARACTER [emerging from Cognito's pipe]: Oh no, you won't!

MR. COGNITO: Oh yes, I will. I always did you know, but who knows-

DOWNS [voice-over]: For a pizza commercial, he molded a devilish character called the Noid. There have also been feature films. "The adventure of Mark Twain" was released in 1985.

MR. VINTON: We spent three years on "Mark Twain," and then, you know, we spent 12 weeks on - [laughs] on the Raisins. You realize the power of television. I mean, it really is phenomenal, because it reaches absolutely everyone.

DOWNS [voice-over]: This commercial first aired last September, prompting a six percent rise in the sales of California raisins. By Halloween, they'd become the hip thing to be. These kids are in Johnstown, Pennsylvania. All this for a product that

had a generally poor image and was even called "nerdfood" in consumer tests. Now there is a flood of fan mail for the sticky stars, and 20/20 has learned that in a new survey, the Raisins are more popular with youngsters than old favorites like charlie Brown and Garfield the Cat, a true advertising phenomenon. With a classic Motown song by Marvin Gaye and a basic idea supplied by the ad agency, Vinton and his team set to work on their Claymation, as they call it. Mark Gustafson worked on the commercial.

MARK GUSTAFSON, Designer/Animator: It was my jog to put the character into the Raisins. Well, if you can you make a raisin cool, you can make anything cool. You put 'em in white gloves and spats, and you have 'em singing "Heard It Through the Grapevine," and you're halfway there.

DOWNS [voice-over]: To go the rest of the way and perfect the movements in clay, a

rough reference film is made. We've intercut it with the final product to give you an idea of how it was use.d The lead singer is Buddy Miles.

BUDDY MILES [singing]: I heard it through the grapevine, raised in the California sunshine -

ANNOUNCER: California raisins from the California vineyards-

MR. MILES [singing]: Don't you know that I heard it through the grapevine.

DISC JOCKEY: Sounds better than what I got.

MR. VINTON: They become their own personalities, and all the Raisins are named, and in the second spot, it's Buddy Raisin and the Raisinettes, Seth, (ineligible) in the background. But, I think there's also something sort of very special about these kinds of these figures, these fort of real

three-dimensional figures, that you know live in a three-dimensional space.

[Song: Bend me, shape me, any way you want me, long as you love me, it's all right. Bend me, shape me...]

DOWNS [voice-over]: The space where the Claymation characters spend their off hours is Vinton's Portland, Oregon, studio, surrounded by the designers and animators. When they're on the set, the actual clay animation requires exact timing and precise planning for each little move. Every frame takes slightly different picture, though the finished film looks like continuous movements.

MR. VINTON: A good day of animation might be, on 50, 70 frames of actual shooting. That's 24- at 24 frames a second, that's about, you know, two or three seconds of finished work. Sot it is real, time-consum-

ing sort of process, and it is, therefore, also expensive.

DOWNS [voice-over]: It has been rewarding. Vinton has been collecting awards for over a decade, including an Oscar. A feature length film of his work is opening now across the country. But the most fun, Vinton and his team told us, is when they create a character who takes on a life of his own [and] becomes a valued member of their repertory company.

MR. VINTON: We have a character I'm very, very fond of, called Wilshire Pig, who's been signed on various productions, including "Dance Can't Dance."

[Song: The little pig knows what to do. He's silent and quick, just like a Oliver Twist...]

MR. VINTON: He's just been signed to avery, very big role in a major feature that we're developing right now. And he and we are

very excited about that. Claymation offers the opportunity to really build an entire image, to bring the whole thing to life from ground up, and there is really something kind of existing about that.

ANNOUNCER [clip from Raisin commercial]: Sounds grape, doesn't it?

DOWNS: Grape!

WALTERS: Who would have the patience?

DOWNS: I wouldn't, I wouldn't, but we haven't heard the last of this, because the Raisins alone are going to fall on Raisin mugs and Raisin tee-shirts and Raisin chapeaus. It's quite an industry.

WALTERS: That's grape.

DOWNS: And the grape growers must be ecstatic.

WALTERS: We'll be right back with more.

[Commercial break]

WALTERS: And now, here's Ted Koppel with a word about tonights Nightline. Ted?

TED KOPPEL: Barbara, it was the President's great foreign policy passion, raising money for the Nicaraguan freedom fighters, the contras. He was in on every step at the beginning, but what happened at the end? That's our focus tonight. Hugh?

DOWNS: Thank you, Ted. And that's 20/20 for tonight. Thank you for being with us.

WALTERS: And remember, we're in touch, so you be in touch. I'm Barbara Walters.

DOWNS: And I'm Hugh Downs.

WALTERS: And for everyone here at 20/20, good night.

DEPOSITION OF

PATRICIA B. DERBY

Saturday, October 24, 1987

Pages 17 through 19:

* * *

Q. Did you obtain a degree from either of those universities?

A. No.

Q. Where did you attend high school in Texas, if that's where you lived during high school?

A. I didn't live in Texas.

Q. Where did you attend high school in England?

A. I didn't attend high school. I went to a private school.

Q. What was the name of that school?

A. I went to two. On was Miss Frithim's.

Q. Miss?

A. F-r-i-t-h-i-m-s.

Q. And what city in England is that?

A. London.

Q. And what years were those?

A. Nineteen -- 1947 through 19 --

I can't -- I really can't remember.

Q. Okay. Was there any other school -- high school that you attended in England?

A. No.

Q. After you completed a year -- that's one year at Columbia in New York, 1954 to 1955 -- did you matriculate at any other universities?

A. No.

Q. Did you attempt ever to obtain a degree at any other university?

A. No.

Q. Have you studied biology at any university other --

Did you study biology at Cambridge or Columbia?

A. No.

Q. What did you study at Cambridge?

A. English literature.

Q. And what did you study at Columbia?

A. English literature.

Q. Have you ever attended any universities and taken courses in either biology or anthropology?

A. No.

Q. Have you ever traveled to Africa in your adult life?

A. No.

Q. have you ever been to India?

A. No.

Q. What countries outside of the United States and England have you traveled to, if any, that have elephants in a wild state?

A. None.

Q. -- such as southeast Asia?

A. None.

Q. Can you tell me if you've ever written any books or articles, in a general comprehensive way, on elephants?

A. No.

* * *

Pages 27 through 34:

* * *

Q. Can you recall if that article deals with animal psychology dealing with separation of elephant and stress?

A. No, it deals with management of populations.

Q. It does?

A. Uh-huh.

Q. Do you remember if the author observes in that article that it's better for elephants to be destroyed or culled, as opposed to being separated from each other?

A. Most of the authors who write about culling present both sides of the problem.

Nobody has really formed an opinion about that yet, that I've read.

Q. So we understand each other, are you the only person that has formed an opinion that it's better for elephants to be killed or destroyed than to be separated from each other?

A. I don't know that I'm the only one.

I'm saying that most of the authors who have written about it present the problem from both sides.

Q. Do any authors express an opinion, like yours that was published on "20/20," that it's better for elephants to be destroyed than to be separated from each other?

A. I haven't read all the authors.

I'm sure -- I don't know.

Q. Okay. Do you know of any other animal expert or anthropologist or biologist who has ever expressed an opinion like yours, that if it's a choice between two, that they either be destroyed or separated, it's better they be destroyed?

MR. JONES: I object to the question, because it mischaracterizes the expression of views of the program.

You might want to take a look at the program --

MR. DOUGHERTY: Well --

MR. JONES: -- and see what the views are that she's expressed, because you're not characterizing it fairly.

What you're saying is, she drew a distinction between culling and separation from the herd.

What was done on the broadcast was, if the elephants are dispersed to

whomever in the United States through a dealer who has no control, then in her view, in that situation, because of the risks of mishandling, bad diet, poor care, atrocities, then she thought it would have been better that they had been killed.

But mere fact of separation from the herd versus culling was not the distinction she was making.

But you can take a look at the program and find out.

MR. DOUGHERTY: I wish Mr. Jones, that you would make an objection instead of giving a speech.

MR. JONES: Okay. I do object, because I think you're mischaracterizing the --

MR. DOUGHERTY: Let me ask her.

Q. Is it your opinion that if elephants are separated from a herd in which

they were members, that -- in your opinion, that that is stressful?

A. Yes.

Q. Is it your opinion that as a result of separation from a herd, that they experience problems in eating, among other stressful reactions?

A. Yes.

Q. Is it your opinion that as a result of separation from a herd, that they can die?

A. Yes.

Q. Have you ever known of an elephant who has been so separated to die?

A. Yes.

Q. Did you observe such an event?

A. Didn't observe it, no.

Q. Who told but[sic] such an event?

A. An animal dealer.

Q. What was his name?

A. I can't remember his name.

If you'd like me to spend some time and tell you the specific story, I can.

Q. That's what I'd like you to tell me.

A. Would you like me to --

There is some other --

Q. I'd like to go into that, and then we'll come back to the bibliography.

I'd like you to tell me about that story.

A. The first elephant I ever worked with and had total responsibility for was an Asian elephant that was acquired by the first company that I ever worked for, a company called Africa USA.

The Asian elephant weighed 200 pounds and was 32 inches high. It had been brought over by an animal dealer, and I doubt that I ever knew the dealer's name.

Q. What year did this event occur in?

A. '63, 1963.

Q. And where were you when this event was occurring?

A. I was employed at Africa USA.

Q. Where was that, physically.

A. In Saugus, California.

Q. And who was in charge of that company, who owned it?

A. It was owned by Ivan Tors and Ralph Helfer.

Q. Would you spell his last name?

A. H-e-l-f-e-r.

A. Okay.

MR. JONES: I'm sorry, H-e-l-f-e-r?

THE WITNESS: Right.

MR. JONES: Okay, I'm sorry.

THE WITNESS: The elephant had come in with two other babies, and they kept them for some reason, for some amount of time, in New York.

MR. DOUGHERTY: Q. Who is "they," the seller?

A. The dealer.

Q. The dealer whose name you don't remember?

A. I don't remember.

It was some place --

I think it was in Long Island, where they --

At that point in time, elephants were being brought in in large numbers, before our Animal Welfare Act.

But, at any rate, they were kept together for a considerable amount of time.

The other two --

Q. What amount of time?

A. Not a considerable amount, but they were brought over.

They were put together in India. They were brought over together, and they were kept there for probably, I don't know, a month or two.

Q. Let me stop you there.

The source of this information as to how long the Asian elephants had been kept together was based on hearsay?

You would have no knowledge of that, correct?

A. No.

Q. Excuse me.

And how long the elephants that you're now about to describe were kept together in Long Island, again, is based on hearsay?

You had no personal knowledge of that, correct?

A. Right, yes.

Q. And you never saw the elephants in either Asia or Long Island, correct?

A. Yes.

Q. That is correct, you did not see them until they appeared in Saugus, California?

A. One appeared. The other two didn't.

Q. Okay.

A. the other two died.

Q. Where?

A. I don't know.

Q. They didn't die in Saugus, California?

A. No.

Q. Did they die before the elephants you saw in Saugas[sic], California appeared?

A. Yes.

Q. And that was based upon what somebody told you?

A. Yes.

Q. Okay, and you don't know the name of that person?

A. Oh, I know the name of the person who told me.

Q. Who was that?

A. A lady named Ruth Guarin, G-u-a-r-i-n.

Q. Did she tell you why the other two elephants died?

A. She said they had died because they were separated.

Q. Did she tell you that she saw the pathology report or autopsy report?

A. No.

Q. Did you ask her?

A. No.

Q. Don't you think that would be significant to know.

A. No.

Q. Okay. Did she tell you that she saw the elephants die?

A. No.

Q. Did you ask her that?

A. No.

Q. Where did you have this conversation with Ruth, in Saugus or over the telephone?

A. In Saugus.

Q. What was she doing there?

A. She was the secretary.

Q. For?

A. Africa USA.

Q. Okay.

Pages 65 Through 66:

* * *

Q. Why do you consider yourself an expert in elephants?

A. I don't consider myself an expert in elephants, no.

Q. Not at all?

A. I consider I'm still learning about elephants. I consider myself probably one of the best elephant handlers, but I'm not --

I haven't spent years in Africa at all, but I also feel very strongly -- I have spent probably more physical time living with specific elephants than anybody I know.

Q. Do you believe that living with elephants is essential to understanding their behavior?

A. Definitely. Oh, definitely.

I definitely do, and I think most people that study elephants do.

Q. Don't most people who study elephants study them in their natural habitat?

A. Yes.

Q. And you don't?

A. No.

Page 69:

* * *

Q. She hasn't shared her existence with another elephant?

A. No.

* * *

Page 77:

* * *

Q. Okay, and then who did you work for?

A. I worked for them until Ivan Tors got in in 1963, I believe.

Q. Is that when you met Mr. Caras?

A. Roger Caras?

Q. Uh-huh.

A. No, I met Roger Caras in Nineteen -- I think it was 1972.

* * *

Pages 96 and 97:

* * *

Q. How did she know how to contact you?

A. Well, we certainly had had a lot of notoriety when we took the first baby elephant from here to Jumbolair, and --

MR. JONES: Do you know --

MR. DOUGHERTY: Q. I don't want you to make an assumption.

A. I have no idea, no.

Q. One day, the phone rings, and somebody's on the phone and says it's Lynn Murray from ABC News, and I wanted to find out how she knew to call you.

A. I have no idea.

Q. What did she say to you, as best as you can recall, and what did you say to her?

A. She asked me if I would do an interview about the elephants at Jumbolair.

Q. Did she say anything else to you?

A. That's basically it.

Q. Did you ask her why she was calling you?

A. Well, I knew why. She asked me to do an interview.

Q. How did you know that?

How did you know what was on her mind?

A. She asked me if I would do an interview for "20/20" about the elephants at Jumbolair.

Q. Okay. Did she discuss with you what was going to be in the interview?

A. She discussed with me the moving of the elephants, the sale of the elephants.

Q. You didn't contact her first, or anybody at ABC?

ABC contacted you first, is that your testimony?

A. Yes.

Q. You never contacted ABC at any time until you received a telephone call from Lynn Murray, correct?

I'm asking you which came first.

Did you contact ABC, which set off a sequence that led to Lynn Murray contact-

ing you, or did Lynn Murray, just out of the blue, call you up on the phone?

A. I'm sure that Lynn Murray called me.

Page 102:

* * *

Q. Mr. Jones, or Nautilus, was to give that 71 to you free, is that correct?

A. Yes.

Q. And then you established the value of it?

A. At $10,000.

Q. At $10,000, and that's --

A. We donated an elephant to him which we paid $10,000 for, so that was the basis for the value.

Q. Which elephant came first?

A. Mara.

Q. Okay. And that's reflected in a latter, and we'll put all these together as

a composite Exhibit 6, unless you want to do them separately.

But if you want to call --

This is a letter of August 27th, 1986, the letter that you're referring to.

MR. JONES: But you're --

I think you're getting out of chronology here.

THE WITNESS: Yes, this letter was written after we brought 71 back.

Pages 123 and 124:

* * *

Q. Where did they come to?

A. They asked me to come to New York.

Q. When did they ask you to do that?

She asked you on this third --

A. She didn't call me.

Q. Who did.

A. The unit manager, and I can't remember his name. It was a man called me and said that they really didn't have the

budget to come to California, so would I fly to New York for the interview, and I said, "Fine."

Q. Who was going to pay for it?

A. ABC paid my fare.

Q. Okay. How much time went by between the third conference with Lynn Murray and this call from the united manager, from a male?

A. I don't remember.

Q. What month did you go there in?

A. You know, I don't remember that, either.

I think it was February of this year, of '87.

It was a short time before the piece aired. It was perhaps two weeks.

Q. Who met you at the airport?

A. A limousine.

Q. A big Cadillac?

A. No. Fugazzi (phonetic).

Q. I didn't mean the name of the rental agency.

I meant who from ABC showed up?

A. No one.

Q. Okay. Where did they take you, what hotel?

A. The limousine took me -- call it a limousine; it was Fugazzi -- took me to the hotel.

Q. Which hotel?

A. The Essex House.

Pages 165 to 166:

Did the 1984 broadcast ever come to you attention, that a herd or some portion of a separated herd of African elephants were flown to Ocala by Arthur Jones and crew on a 707?

A. Yes.

Q. Did you call Roger and say, "That's not the right thing to do. Those

African elephants should not have been brought here"?

A. Yes.

I also called Sue Pressman and said, "What is Roger Caras doing?"

Q. And you did that sometime in 1984?

A. Yes.

Q. What did Roger say to you when you told him, "Listen, Roger, this is" --

Well, you tell me what you said to Roger.

A. I said, "Roger, what are these people intending to do with these elephants?"

Q. What did he say?

A. He said, "This man is extremely wealthy, has a ranch in Florida, and I assume he intends to keep them there for life."

Q. You remember him saying, "I assume"?

A. Yes.

Q. As opposed to Roger saying, "He told me that he intends to keep them there for life"?

A. Well, I really don't -- I really don't --

Q. Your testimony was you assume. You testified what you did.

But my question specifically is, can you recall asking Roger, "Look, people die, Roger. He's an older man. Did you ask the man before he flew the African elephants to the United States what's going to happen to him if he dies?"

Did you ask Roger that?

A. Yes, I did.

Q. And what did Roger say to you?

A. Roger says, "He's provided for them in his will."

Q. Oh, he told you that?

A. Yes.

Q. In 1984?

A. Yes.

Q. And did Roger say that he had spoken to my client, and my client had told him in 1984 that the African elephants were provided for in his will?

A. That's what Roger said, yes.

Q. Okay. Did you tell Roger that you considered it wrong in your experience and judgment to have brought the African elephants here to begin with?

A. Yes.

Pages 176 Through 178:

* * *

Q. And Roger invited you to have lunch with him?

A. I spent the weekend with him and his wife in Easthampton.

Q. Had you arranged to have a weekend trip with him before you flew from California?

A. No.

Q. When did that come up?

A. I think it came up when they decided --

At first, I was to have done the interview, I think, on Tuesday, and I would have flown back immediately.

Q. Okay.

A. When they decided that I was to do the interview on Friday, they -- Roger -- Roger's wife, Jill, asked me if I'd like to stay the weekend with them.

Q. By calling you long distance?

MR. JONES: What do you mean, long distance.

MR. DOUGHERTY: Q. She had to call you to articulate her thought.

Did she call you from New York to California before you arrived in New York, or did she call you while you were in the hotel room?

A. She called me from Long Island to California, to invite me for the weekend.

Q. So you knew that was an invitation before you came to New York City?

A. Yes.

Q. Okay. So --

A. But my original flight was booked to go there that day, do the interview, and return.

They had to change my tickets.

Q. Who changed it?

A. ABC did.

Q. In order to stay there the weekend with them?

A. Yes.

Q. At their request?

A. At --

Q. Roger's request, and his wife's request?

A. Jill Caras's request.

EXHIBITS TO DEFENDANT,

AMERICAN BROADCASTING COMPANIES, INC.'S

MOTION FOR SUMMARY FINAL JUDGMENT

Exhibit F, Pages 254-255:

* * *

QUESTION: Somewhere in this, because some bad things have been done -- somewhere in here there's a villain. Now the players are Arthur Jones, Ralph Cramer, another keeper by the name of Wilburt, David Meeks-- a sometimes animal dealer who says he isn't an animal dealer... Travis Ward, who bought, didn't buy, bought, whatever - the Nautilus - somewhere in here there's a villain. Someone is doing something terrible to elephants, which was not the advertised intent when they were brought here. Can you identify who was doing bad things here for us?

PAT DERBY (A): The villain of this piece is our system. The system which allows anybody to bring elephants anywhere and do anything they choose. What we do to animals in general is not wonderful. What we do to elephants is horrible.

Deposition of Arthur Allen Jones

June 19, 1987

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* * *

Q. So do you recall any specific questions she asked of you that led you to believe that she was not an experienced elephant handler?

A. She presented herself as being totally inexperienced, totally lacking knowledge and seeking knowledge.

(2)

Supreme Court, U.S.
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No. 92-759

In The

Supreme Court of the United States

October Term, 1992

ARTHUR JONES,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should deny certiorari in this diversity case, where, as here, (1) the court of appeals correctly decided that under applicable Florida law the broadcast in suit was not defamatory and, therefore, concluded correctly, that it was unnecessary to consider the federal constitutional question, which the petitioner seeks to assert in this Court, regarding the scope of protection to be accorded statements in the broadcast under *Milkovich*, and (2) the case does not otherwise present *any* consideration set forth in this Court's Rule 10 which governs the Court's exercise of its discretionary review authority upon applications like petitioner's.

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THE PETITION SHOULD BE DENIED BECAUSE THE ENTIRELY CORRECT RESULT BELOW – THAT THE BROADCAST IN SUIT WAS NOT DEFAMATORY AS A MATTER OF LAW – DOES NOT PRESENT A FEDERAL QUESTION OF ANY KIND, MUCH LESS A SUBSTANTIAL ONE, FOR THIS COURT'S REVIEW OR OTHERWISE INVOKE ANY CONSIDERATION IN THIS COURT'S RULE 10, WHICH GOVERNS PETITIONS LIKE THE PRESENT ONE, BUT RATHER RESTS EXCLUSIVELY UPON AN INTERPRETATION OF STATE LAW 5

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STATEMENT OF THE CASE AND FACTS

This is the petitioner's second request in this Court for a writ of certiorari to review the judgment of the court below. When the petitioner was here last, in June of 1990, this Court had just decided *Milkovich v. Lorain Journal Co.*, 479 U.S. 1, 110 S. Ct. 2695 (1990). The petitioner claimed that *Milkovich* applied to his case, which was a defamation suit based upon a segment from ABC's 20/20 television program entitled "Save the Elephants." The segment in question, which aired on March 12, 1987, related how some of the herd of baby elephants which Jones had airlifted from Africa in 1984 began to be sold off after a time on Jones' farm in Ocala, Florida. ABC responded (1) that, as the lower courts had found, the broadcast was not defamatory of Jones (Respondent's Brief in Case No. 89-1952 at 12-13);[1] in the language of the applicable state law on defamation, only Jones' "tortured" and "unreasonable" interpretation of the broadcast made it defamatory, and (2) that, in any event, the statements attacked by Jones were protected opinion under *Milkovich* and related decisions of this Court. (App. at 18-20).

Consistent with its traditional practice of directing reconsideration of a case where a pending petition appears to raise issues generally similar to those just addressed by the Court in a plenary decision, the Court remanded the case to the Eleventh Circuit "for further consideration" in light of *Milkovich*. *Jones v. American Broadcasting Companies, Inc.*, ___ U.S. ___, 111 S. Ct. 239

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[1] Attached as an appendix ("App.") to this response. (App. at 16-17).

(1990). As one lower court has put it, the Court "merely 'flagged' this case as one upon which [this Court's] intervening decision may have some bearing. . . . " *Bush v. Lucas*, 647 F.2d 573, 575 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983); *see also United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992) (A "vacation," such as the one here, was not a ruling that the Court's new decision "actually affected the outcome" of the case but rather an "instruc[tion]" that the lower court "make that determination." The lower court "was free to adopt any or all of [its prior ruling] that, upon reconsideration, it determined to be unaffected by [the Supreme Court's intervening decision]."); *see generally* Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L. Q. 5, 19 (1984) ("[A] general similarity of issues and a surface inconsistency in results will usually suffice to persuade the Justices to remand a case rather than deny review.")

Upon such further consideration, the Eleventh Circuit reaffirmed its ruling that the case was properly dismissed upon summary judgment because the broadcast was not defamatory under state law. *Jones v. American Broadcasting Companies, Inc.*, 961 F.2d 1546, 1547 (11th Cir. 1992). The court of appeals, therefore, concluded correctly, that it was unnecessary to consider the constitutional issue of whether the statements attacked should also be immune from suit as protected opinion under *Milkovich*. 961 F.2d at 1547.

In the course of its per curiam opinion, the Eleventh Circuit quoted with approval this language from the district court's opinion:

> " 'Taken in context and without giving the broadcast any 'tortured' interpretation, . . . a reasonable person would not have interpreted the broadcast, in whole or in part, as being defamatory to [petitioner].' "

Id.

Because this finding of "no defamation" – which is concedely a matter of state law – "logically precede[d]" the district court's further finding of "non-actionable opinion" and because, as the Eleventh Circuit put it, "[o]nly the latter finding . . . arguably could be affected by the Supreme Court's opinion in *Milkovich*," the court of appeals saw no reason to reconsider its prior affirmance of the district court's judgment which it concluded, correctly, rested "on the alternate, and logically prior, [state law] ground of absence of defamation." 961 F.2d at 1547.

Jones says that the court of appeals misread the district court's ruling on defamatory meaning. However, the language from the district court's opinion, quoted by the court of appeals, could not be more direct or unambiguous. Moreover, as Jones knows, the very first legal issue presented to the district court – which Jones himself helped formulate and to which he stipulated in a joint memorandum to the court (R2-52) – was whether, "[u]nder Florida law . . . ," the "statements made in the broadcast [were] reasonably capable of a defamatory meaning." Pet. at 4; 4-5. The lower courts have now decided this state law issue against Jones three times, confirming, contrary to the assertion in the "Question" Jones presents to this Court (Pet. at i), that the broadcast simply does not contain statements accusing Jones of

"hypocrisy, lying, unscrupulousness and cruelty to animals," just as ABC has argued repeatedly and successfully since the inception of this lawsuit.[2]

Jones' chief claim in this Court is that the finding of "no defamation" was error (Pet. at i *passim*), and based upon that assumed error, Jones urges that the lower court further erred by "ignor[ing]" and "sidestepp[ing]" *Milkovich* and "refus[ing]" to apply the *Milkovich* analysis to the case. Pet. at 3, 7, & 13. In support of his reargument on defamatory meaning, Jones incorporates in his present petition the statement of facts about the broadcast contained in his prior petition to this Court. Pet. at 2. As ABC pointed out in response to the prior petition (App. at 13), Jones' account of the broadcast included cutting and pasting of statements in the broadcast to sustain Jones' claims of falsity and defamation. An accurate summary of what was in fact said in the broadcast is set forth in ABC's earlier brief at pages 1 through 10. (App. at 5-14). Also, for some reason, Jones twice tells this Court, completely inaccurately, that ABC "insisted discovery was necessary to determine defamatory meaning." Pet. at 4 n.2 & 11. In fact, ABC sought and obtained protection against discovery because the determination of defamatory meaning was solely a question of law for the court to decide (R2-31), a point to which Jones later stipulated (R2-52; 694 F. Supp. at 1548), and which he thereafter acknowledged at oral argument in the Eleventh Circuit upon the first appeal in this case.

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[2] *Jones v. American Broadcasting Companies, Inc.*, 694 F. Supp. 1542, 1553 (M.D. Fla. 1988), *aff'd*, 893 F.2d 1342 (11th Cir. 1989), *cert. granted, judgment vacated, case remanded for further consideration*, 111 S. Ct. 239 (1990), *aff'd on remand*, 961 F.2d 1546, 1547 (11th Cir. 1992).

As the authorities and brief argument which follows demonstrate, this Court does not sit to review questions of state law and certainly avoids, where it can, resolution of constitutional issues that are not necessary to the disposition of a case. This case clearly does not require or warrant resolution of any federal issue, much less one of public importance; nor does it invoke any other consideration set forth in this Court's Rule 10, which governs the Court's exercise of its discretionary power of review. To the contrary, this case is merely a local law dispute raising issues of interest to the litigants only, which has been repeatedly decided, correctly and fairly, against the petitioner by the lower courts. Nothing about this case warrants additional review by this Court pursuant to its extraordinary, and necessarily limited, discretionary review authority.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THE ENTIRELY CORRECT RESULT BELOW – THAT THE BROADCAST IN SUIT WAS NOT DEFAMATORY AS A MATTER OF LAW – DOES NOT PRESENT A FEDERAL QUESTION OF ANY KIND, MUCH LESS A SUBSTANTIAL ONE, FOR THIS COURT'S REVIEW OR OTHERWISE INVOKE ANY CONSIDERATION IN THIS COURT'S RULE 10, WHICH GOVERNS PETITIONS LIKE THE PRESENT ONE, BUT RATHER RESTS EXCLUSIVELY UPON AN INTERPRETATION OF STATE LAW.

Rule 10 of this Court, which lists the considerations governing review on writs of certiorari, like petitioner's, recites in pertinent part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *

It is apparent from the plain language of Rule 10 that *none* of the considerations relevant to a review by this Court of the decision below are present here: there is no "conflict" between or among circuits and none is asserted; nor is a "federal question" involved; and there has certainly been no "depart[ure] from the accepted and usual course of judicial proceedings. . . . " Upon a plain reading of Rule 10, therefore, the petition should be denied.

While the list in Rule 10 is neither exhaustive nor controlling, there are no special or important reasons in this case for a different result. To the contrary, the chief claim of the petitioner is simply that the court below

erred in its application of the law. In the first place, the petitioner's claim of error is totally lacking in merit. Considered as a whole, unedited by Jones, the broadcast was in no way defamatory of Jones, as the lower courts have already decided three times. Nor was there any improper "sidestepping" of *Milkovich*. *See, e.g., Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992) (The application of *Milkovich* standards to allegedly defamatory statements is unnecessary where, as here, "the statements are not defamatory under state law."). Indeed, it would be alien to the practice and procedure of this Court, and federal courts generally, to reach out, as the petitioner would have this Court do here, and decide constitutional issues which are not necessary to the disposition of the case. *In re Snyder*, 472 U.S. 634, 642, 105 S. Ct. 2874, 2880 (1985).

Furthermore, of equal importance here, this Court is not, and never has been primarily concerned with the correction of perceived errors alleged to have been made by lower federal courts. *Boag v. MacDougall*, 454 U.S. 364, 366, 102 S. Ct. 700, 701 (1982) (O'Connor, J., concurring) ("[T]his Court is not equipped to correct every perceived error coming from the lower federal courts. The effectiveness of this Court rests in part on its practice of deciding cases of broad significance and of declining to expend limited judicial resources on cases, such as the present one, whose significance is limited to the parties. In exercising our discretionary certiorari jurisdiction, we should not be influenced solely by the merits of the petitioner's case."); *Watt v. Alaska*, 451 U.S. 259, 275, 101 S. Ct. 1673, 1682 (1981) (Stevens, J., concurring) ("Today [the courts of appeals] are in truth the courts of last resort for almost all federal litigation. . . . Most certainly, this Court does

not sit primarily to correct what we perceive to be mistakes committed by other tribunals."); *Ross v. Moffitt*, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2446-47 (1974) ("This Court's [direct certiorari] review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

This is especially true in diversity cases, like this one, which involve an alleged misinterpretation of state law. *Lapkoff v. Wilks*, 969 F.2d at 81 (In defamation cases, like this case, "state law . . . determin[es] whether the statements were, in fact, defamatory."). In such cases, certiorari is routinely denied. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.2, at 194-95 (6th ed. 1986) ("[T]he [Supreme] Court[] lack[s] . . . interest in reviewing diversity cases where the only certiorari ground is an alleged conflict with applicable state law."); Mark R. Kramer, Comment, *The Role of Federal Courts in Changing State Law: The Employment At Will Doctrine in Pennsylvania*, 133 U. Pa. L. Rev. 227, 233 (1984) ("The Supreme Court routinely denies certiorari to cases involving misinterpretation of state law by the federal courts."); William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. Legal Stud. 367, 373 (1980) ("[T]he Supreme Court rarely – if ever, in modern times – reviews diversity cases.").

The lower court properly disposed of the case upon remand in this matter, and this Court's denial of certiorari upon Jones' fourth bite at the apple is very clearly warranted. Each time this case has been considered on the merits, the petitioner's contentions have been fully considered and properly rejected. Litigation over the matter should now come to rest.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 89-1952

In The

Supreme Court of the United States

October Term, 1989

ARTHUR JONES,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The television program in suit simply does not contain any statements or accusations like those embodied in Petitioner's "Questions Presented." Rather, the program consists entirely of facially non-defamatory statements or figurative expressions of speech wholly protected by the First Amendment and not actionable, as this Court just confirmed in the case of *Milkovich v. Lorain Journal Co.*, 58 U.S.L.W. 4846 (U.S. June 21, 1990).

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STATEMENT OF THE CASE AND FACTS

Petitioner Arthur Jones seeks to associate himself closely with the *Milkovich* result as if it were similar. *Milkovich,* however, bears no resemblance to this case on its facts, and the Court's decision there confirms the correctness of the result below. *Milkovich* involved a statement in a newspaper column that the Petitioner there had "lied at [a court] hearing . . . after having given his solemn oath to tell the truth." 58 U.S.L.W. at 4847 As this Court found, the foregoing statement could be read to include the provable factual assertion that Petitioner Milkovich had committed the crime of perjury. 58 U.S.L.W. at 4851. The present case, which involves a segment of ABC's 20/20 television program entitled "Save the Elephants", presents no remotely similar statements. In particular, as the lower courts found, the broadcast in suit contained no statements accusing Jones of "hypocrisy, lying, unscrupulousness [or] cruelty to animals", contrary to the implication in the "Question" Jones presents to this Court. Pet. 1. Indeed, the actual phrase of chief concern to the Petitioner – a portion of a lead-in to the segment referring to a "promise" to "some baby African elephants" that "was not kept" – is exactly the sort of figurative expression repeatedly confirmed by this Court, most recently in *Milkovich* itself, 58 U.S.L.W. at 4851, as absolutely protected by the First Amendment and not actionable.

A. THE BROADCAST IN SUIT

Over the years, Jones, an acknowledged public figure, has invited and received media attention and

repeated press coverage in publications such as *The Wall Street Journal, Newsweek, Business Week, Forbes, Playboy* and *Time*. He was the subject of a report on the television program "Lifestyles of the Rich and Famous." *Jones v. American Broadcasting Companies, Inc.*, 694 F. Supp. 1542, 1545 (M.D. Fla. 1988). He is the inventor of the Nautilus exercise machines, which he describes as a "thinking man's barbell". At one time Jones hosted a national television series entitled "Wild Cargo", and he produced hundreds of films for television of his exploits with wild animals. R1-20-Exh. B at 5, 6, 9, 14. The coverage of Jones has not been limited to his business affairs, but has also covered aspects of his colorful personal life. 694 F. Supp. at 1545.

In 1984, Jones transported sixty-three baby African elephants from Zimbabwe to his Ocala, Florida farm, "Jumbolair," aboard one of his 707 jet airliners. Respondent accompanied Jones on that trip, and Jones fully cooperated in the production of a 1984 "20/20" broadcast about it entitled "The Flying Elephants." The report also pictured Jones' airlift of the baby elephants back to Jumbolair.

The herd resided on Jones' Ocala estate until about July 21, 1986, when the elephants began to be dispersed pursuant to an agreement signed with David Meeks of the Little Mountain Zoological Park in Inman, South Carolina. 694 F. Supp. at 1545.

The 1987 segment of "20/20" that was the subject of this lawsuit was a follow-up to the 1984 broadcast. Entitled "Save the Elephants," it reported on what had happened to the elephants after Jones brought them to Florida in 1984.

The segment was preceded by these lead-ins:

HUGH DOWNS: Good evening, I'm Hugh Downs.

BARBARA WALTERS: And I'm Barbara Walters. And this is 20/20.

* * *

DOWNS [voice-over]: * * * and in 1984, these baby elephants walked into our hearts when 20/20 reported how this Florida millionaire airlifted them to safety. Now the herd must be disbanded, and their future is in doubt. Are we all at fault?

> PAT DERBY, Elephant Expert: What we do to animals in general is not wonderful; what we do to elephants is horrible.

DOWNS [voice-over]: Roger Caras asks if the dream has gone sour, and why its time again to save the elephants.

* * *

WALTERS: Well, later in this program, we'll follow up on the fate of some baby African elephants to whom a promise was not kept. * * *

* * *

DOWNS: * * * , but next, they say elephants never forget, but sometimes people, unfortunately, do. Roger Caras reports why it may be time once again, to "Save the Elephants." Stay with us.

694 F. Supp. at 1546; Pet. A-16-17.

One of Jones' principal contentions in this Court is that Barbara Walters' statement concerning a "promise to baby elephants" that "was not kept" constitutes a defamatory statement of fact about Jones for which he is

entitled to damages. Indeed, Jones draws the Court's attention specifically and particularly to the portion of the district court's opinion examining this contention. Pet. 15-16. The statement in question, standing alone and in the context of the broadcast, was under any analysis a statement of pure opinion, and the district court so concluded. 694 F. Supp. at 1552-53.

The 1987 segment proceeded with this introduction by host Hugh Downs:

> It's been almost three years now since 20/20 first reported on this man, eccentric Florida millionaire and inventor of the Nautilus exercise machines, Arthur Jones, and his daring airlift rescue of a herd of baby African elephants marked for death. It was one of the most talked about segments we've done here. But, as ABC News nature and wildlife correspondent Roger Caras tells us, what we thought was the happy ending to this elephant story is actually, according to the experts, the beginning of a sad and painful journey. 694 F. Supp. at 1546; Pet. A-17-18.

Roger Caras began the next portion of the segment by summarizing and showing excerpts from the 1984 broadcast. Caras first showed a section of the 1984 interview with Jones, in which Jones explained: "I simply could not live with myself if I idly stood by and watched the African elephants become extinct." Caras recounted the "dramatic scene at the time Jones airlifted the elephants from Africa to Florida in 1984," and stated that at that time, "his commitment seemed both emotional and financial." 694 F. Supp. at 1546; Pet. A-18-19.

Caras stated that Jones gave the impression in 1984 that the elephants would spend the rest of their lives at his ranch. An excerpt from the 1984 interview was replayed, in which Jones stated: "We're going to give them an opportunity to survive and to build a self-sustaining herd of African elephants in this country." 694 F. Supp. at 1546; Pet. A-20.

Caras next reported that "[f]or two and a half years, the Zimbabwe orphans lived the good life here on Arthur Jones' estate in central Florida. But all of that's coming to an end. The herd is now being dispersed." Caras quoted Pat Derby, identified as an "experienced elephant handler," who said that splitting up the herd was "a terrible mistake, that nature intended elephants to live in family groups." Derby stated:

> These are extremely social animals. They live for each other, literally, and when you pull a baby elephant out of that situation, that's stressful in itself. I've known of elephants to die just from that. 694 F. Supp. at 1546-7; Pet. A-20-1.

Caras reported "that Jones' elephants got the very best of care from keepers and veterinarians" while on Jones' ranch, but that 31 of the elephants which had started out on Jones' ranch had "gone someplace." The segment then quoted Jones' contention that "the elephants were sold by someone else" while he was selling his Nautilus business, a time when he says that he "lost total control of all of [his] assets." 694 F. Supp. at 1547; Pet. A-21-2.

Caras also reported that Ward International Corporation, the company that had purchased Nautilus, said it never sold any elephants and that the agreement to sell

the elephants to an animal dealer named David Meeks was signed by Jones' foreman, Ralph Cramer. Caras again quoted Ms. Derby, who said that Ralph Cramer had told her "that Arthur had told him to dispose of as many elephants as he could." 694 F. Supp. at 1547; Pet. A-22-3.

Before broadcasting the segment, ABC had inquired of Ward International about Jones' statements regarding his "loss of control." James E. Bonney, Ward's executive vice president, responded in writing:

> When Ward . . . assumed control, efforts were already under way [*sic*] to thin the elephant herd. The previous owners had an agreement with Mr. David Meeks to assist in placing the animals with suitable zoos and wildlife parks. R1-20-Exh. D

Mr. Bonney's letter was shown on camera during the broadcast.

Jones contends that the foregoing back and forth about the disposition of the elephants labelled Jones a liar. Pet. 34-6. That contention never withstood scrutiny, and was rejected by the courts below. Indeed, it is clear that this portion of the segment simply reported what each side had said on the subject of the conceded dispersal of the elephants.

Nor was the exchange defamatory of Jones. Regardless of who actually initiated the sale, it is conceded that the elephants began to be dispersed. The opinion of the broadcast was that the herd should not have been dispersed. However, the "villain" of the piece, to use Jones' phrase, was the "system" not Jones: As Hugh Downs asked rhetorically in the lead-in, "Are we all at fault?" The same view was taken by Pat Derby with whom, to

put it mildly, Jones takes exception. In the "outtake" interview of Derby, Roger Caras asks Derby to identify the villain. She replies: "The villain of this piece is our system." Pet. A-154-55.

Unstated by Jones, but undisputed, is that Ms. Derby has over 25 years experience handling both African and Asian elephants, R1-20-Exh. F at 214-15, is the author of a book, *The Lady and Her Tiger* (Dutton 1976), which details her experiences with nontraditional animals, including elephants, and was entrusted by Jones himself with one of his own baby elephants when it became ill. Jones 6/19/87 dep. at 45-6. Jones, a ninth-grade dropout, has endorsed practical, hands-on experience, like Ms. Derby's, as the best way to acquire expertise about elephants. *Id.* at 56. ABC, of course, inquired into Ms. Derby's qualifications prior to the broadcast. R1-20-Exh. F at 214-15.

In the next portion of the broadcast, Caras reported on what had happened to some of the elephants after they were sold to David Meeks. Caras noted that, when the elephants left Jones' ranch, their first stop was Meeks' Little Mountain Zoological Park in Inman, South Carolina. From there they went to various other places. Caras continued:

> Meeks says he tries to find good homes for the elephants, but good homes are hard to find for animals who may be 12 feet tall, weigh eight to ten tons and be able to walk through concrete walls. And what kinds of homes has Meeks chosen so far? Three elephants, at least, went to private individuals as pets. Eight to small animal parks and circuses not checked out by

> Meeks. The sales were made over the telephone. And one to an animal trainer who Meeks himself admitted to 20/20 uses cruel training techniques. All these are perfectly legal transactions. The problem is, an elephant, once stripped of its herd, dumped so to speak, will become extremely dangerous if not properly handled. 694 F. Supp. at 1547; Pet. A-111.

None of this is disputed. Caras then again quoted Pat Derby:

> So many dumped elephants become quote "rogues," because they're mishandled, they're the victims of improper diet, of every kind of atrocity in the world. Their only way to retaliate, they do one of two things, they either attack or they run. 694 F. Supp. at 1547; Pet. A-111-12.

Caras next reported on what had happened to one particular elephant:

> I don't imagine a baby elephant has the kind of mind that harbors expectations, but if one did, I don't think that any one of the elephants David Meeks sold expected to end up here, in Davenport, Florida, at the Liebel Family Circus. But one was sent here. It died just after a few months. Mr. Liebel's previous elephant died too. 694 F. Supp. at 1547-48; Pet. A-113.

This, also, is undisputed. The broadcast again quoted Pat Derby, who said that caring for the herd is "his [Jones'] responsibility. That herd was brought over here as a herd, and it should remain a herd." It likewise reported Jones' statement: "It was never our intention to keep them all, it was impossible; but if we could have saved them, certainly no harm done." Ms. Derby also stated: "I really feel they should have been destroyed in Africa. It's a quick death. They would have been with their own herd. They

would not have known. To send them into anything else is not kind." 694 F. Supp. at 1548; Pet. A-114-115.

The segment concluded with Mr. Caras summarizing the specific requirements of caring for elephants:

> CARAS [voice-over]: Jones says he doesn't know how many more he will sell, what the optimum herd size may be. Taking responsibility for 96 elephants, a herd that at maturity would weigh between 850 and 900 tons, require 4600 gallons of drinking water and 32,000 pounds of food a day, could be likened to climbing onto a tiger, and Arthur Jones, commenting on elephant ownership in general, said the advice of Confucius might apply.
>
> MR. JONES: "He who chooses to ride the tiger should carefully determine in advance how he intends to dismount." 694 F. Supp. at 1548; Pet. A-115.

In his petition, Jones lifts and repositions a portion of Caras' statement about future sales of elephants to construct his claim of falsity and defamation. Pet. 35. This cutting and pasting, which Jones also did in the courts below, is reason enough to deny his petition here. The full statement, in any event, is accurate. Jones said, as ABC reported, that "it was never our intention to keep" all the elephants, and, just as Caras stated, Jones expressly acknowledged in his "outtake" interview with ABC, unreported by Jones here, the possibility of a "dispos[ition]" of elephants in the future to determine an "optimum" herd size. R1-20-Exh. F at 36-7. In fact, as his foreman Cramer acknowledged, Jones had much earlier directed Cramer to "investigate the elephant market for the purpose of selling [elephants]" and, after the program

aired, obtained additional license authority to sell elephants. Cramer Dep. at 83-88; 97-116 and related exhibits.

Mr. Caras and Ms. Walters then concluded the broadcast:

> WALTERS: He who chooses to bring over a herd of elephants should carefully think of what he's going to do after he has them in his backyard, shouldn't he?
>
> CARAS: Barbara, it's no different than going to a pound and adopting a dog or a cat. If you're rich enough to go to Africa and bring a herd of elephants then your responsibility [is] for the life of the animals, and elephants live 60 to 70 years. He's a very rich man. He should endow these animals, give them to a university, keep them together so they can be studied and they can be cared for long after he's dead and we're dead.
>
> WALTERS: What would it cost?
>
> CARAS: Millions, but he's got the millions – $5 million, $10 million. And if not, maybe someone in the audience will come up with the money, but clearly, they should not be dissipated like that. We just got word that six more are being sent to a circus in Mexico. It's a fate worse than death.
>
> WALTERS: You know, we forget, isn't it cute, we're going to have all these elephants, and we're going to adopt these dogs or these cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's hope that something can be done about it.
>
> CARAS: Thank you, Barbara, thank you, Hugh. 695 F. Supp. at 1548; Pet. A-115-17.

B. PROCEEDINGS BELOW

After "Save the Elephants" was televised on March 12, 1987, Jones, in a letter dated March 16, 1987, demanded that ABC retract the contents of the broadcast, asserting that the "sting" of the broadcast was that it had falsely labeled Jones a "wacky screwball". R1-20-Exh. A at 29-32. A few days later Jones sued ABC, claiming the March 12 broadcast had caused him $1 billion in actual damages. He sought an additional $3 billion in punitive damages. R1-1.

ABC moved for summary judgment on November 6, 1987. Jones filed his response on April 18, 1988, for the first time complaining that the lead-ins to the broadcast, including the "promise to elephants" phrase of which Jones makes so much in this petition, was defamatory. 694 F. Supp. at 1545. At the district court's direction the parties on June 8, 1988, filed a joint memorandum delineating the disputed and undisputed issues of fact and law necessary to decide the motion.

On September 7, 1988, the district court granted ABC's motion for summary judgment and ordered that the action be dismissed with prejudice. The district court's opinion, reported at 694 F. Supp. 1542, reflects a careful and painstaking examination of Jones' contentions.

As a result of its examination, the district court concluded that a reasonable person would not have interpreted the broadcast, in whole or in part, as being defamatory to Jones. The court concluded that the broadcast could not reasonably be interpreted as labelling

Jones a liar, a cheat, dishonest, a man who breaks promises, an animal abuser, a hypocrite, a "wacky screwball," inhumane, or a man who acted with ulterior motives. 694 F. Supp. at 1548-1553. Consistent with this Court's decision in *Milkovich*, the district court also found that several of the challenged statements – including the lead-in about a "promise to baby elephants" – were "pure opinion" which did not imply " 'concealed or undisclosed set of defamatory facts' " but, rather, were statements based upon undisputed facts or facts to which Jones had stipulated. 694 F. Supp. at 1550-51, 1552-53.

Following Jones' appeal, the Eleventh Circuit, after oral argument, affirmed on December 21, 1989. A rehearing of the appeal was denied on February 27, 1990. This petition followed on May 25, 1990.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The petition should be denied because the broadcast simply does not contain the statements or accusations embodied in the "Question Presented".

The "Question Presented" by Petitioner assumes that the television broadcast in suit contains statements accusing him of "hypocrisy, lying, unscrupulousness and cruelty to animals." Pet. 1. The broadcast simply does not contain any such statements. Petitioner's interpretation of the broadcast is "tortured and unreasonable", as the lower courts correctly concluded. The best proof of the correctness of the lower courts' conclusion is the broadcast itself. Considered as a whole, unedited by Jones, it

illustrates quite plainly that the factual predicate for Jones' charges in this Court is simply absent.

Jones acknowledges as much by his reliance on facially non-defamatory statements, which he edits and rearranges (see discussion above at 9-10), and matters outside the broadcast itself to support his contentions. Pet. 31-7. It is enough to say that Jones' attempt to impart by extrinsic proof a defamatory connotation not carried by the natural meaning of the words used is impermissible. *Southard v. Forbes, Inc.*, 588 F.2d 140, 144-46 (5th Cir. 1979), *cert. denied*, 444 U.S. 832, 100 S.Ct. 62 (1979) (Tuttle, J.); *Tellier-Wolfe v. Viacom Broadcasting, Inc.*, 134 A.D.2d 860, 521 N.Y.S.2d 597, 598 (N.Y. App. Div. 1987). In *Milkovich*, the statement in question was clearly defamatory and actionable unless it was deemed protected opinion. Here, the statements complained of are facially non-defamatory. Only Jones' unreasonable interpretation of them puts them in issue.

ABC cannot be held liable "for broadcasting truthful statements and actions because it failed [in Jones' opinion] to include additional facts which might have cast [Jones] in a more favorable or balanced light." *Machleder v. Diaz*, 801 F.2d 46, 55 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088, 107 S.Ct. 1294 (1987). The exercise of editorial judgment is a First Amendment right which may be curtailed only when "the press so oversteps its editorial freedom that it contains falsity and does so with the requisite degree of fault." *Id.* Respondent has not in any way at all exceeded or abused its freedoms in this case.

2. *Milkovich* mandates denial of the petition or affirmance of the decision below because the challenged statements are clearly protected figurative expressions of speech and not actionable.

The snippet of the district court's opinion, 694 F. Supp. at 1552-53, with which Jones seeks to titillate this Court's particular interest, at pages 15 and 16 of his petition, refers to a "promise to baby elephants" which on its face and in the context of the broadcast is obviously a figurative expression of speech, by any measure or standard. As such, it is fully protected by the First Amendment.

This Court's decision in *Milkovich* makes the point. While declining to recognize a so-called "opinion privilege" in addition to existing protections of speech guaranteed by the First Amendment, the Court confirmed that statements of pure opinion, like the ones here, are nonetheless fully protected by existing First Amendment doctrine. As the Court explained, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." 58 U.S.L.W. at 4851. The Court went on to review other decisions in which it similarly recognized constitutional limits, fully applicable in this case, on the type of speech which may be the subject of state defamation actions. *See* 58 U.S.L.W. at 4851, discussing *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler*, 398 U.S. 6 (1970); *Letter Carriers v. Austin*, 418 U.S. 264 (1974); and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). As *Milkovich* itself and the *Bresler-Letter Carrier-Falwell* line of cases make clear, "loose,

figurative or hyperbolic language" that cannot reasonably be interpreted as stating actual facts about an individual is protected by the First Amendment. "This provides assurance," said the Court in *Milkovich*, "that public debate will not suffer for lack of" such imaginative or rhetorical forms of expression. 58 U.S.L.W. at 4851.

The *Bresler* case is instructive. There, the Court characterized as nonactionable the word "blackmail" as used to describe a land developer's negotiating position because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole . . . " 398 U.S. at 14, 90 S.Ct. at 1542. Quite obviously, the phrase "promise to baby elephants" is substantially less tantalizing than "blackmail" but equally, if not more, figurative and rhetorical in nature. The phrase hardly implied any actual contractual commitment, but like other statements in the broadcast, it merely reflected the opinion that dispersal of Jones' elephant herd was "not right." Statements of what is right or wrong, or moral or immoral, precisely because they involve infinitely debatable subjects, are not "provable as false" and plainly merit protection. *Held v. Pokorny*, 583 F. Supp. 1038, 1040 (S.D.N.Y. 1984) ("Indeed, the Court could not instruct the jury on how to evaluate the truth of a charge of immorality without entering an age old debate better left to philosophers.") The district court did no more than recognize this fact and in so doing ruled, consistent with *Milkovich*, that the statements in question contained no set of implied or "undisclosed" defamatory facts, and were, as a result, not actionable. 694 F. Supp. at 1553. Its ruling was correct and should remain undisturbed.

Finally, were this a close case, it would be relevant to observe that when the subject of the statement is a public figure or a matter of public concern, this fact, too, should be considered in evaluating whether the statement merits protection. As Justice O'Connor wrote in *Hepps*, "where the scales are in . . . an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech . . . [t]o ensure that true speech on matters of public concern is not deterred. . . . " 475 U.S. at 776, 106 S.Ct. at 1564. *See also Ollman v. Evans*, 750 F.2d 970, 1002 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) (Bork, J. concurring).

This Court in *Milkovich* has just provided ample guidelines in the "opinion" area and has laid to rest any confusion that may have existed in the law and among the circuits on the subject. There is nothing at all about this case that warrants a revisit to the subject or otherwise merits the special attention of this Court other than simple application of the *Milkovich* principles and the consequent denial of this petition or affirmance of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied or, more appropriately, this Court should affirm the decision of the court below.

Respectfully submitted,

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